(A) IN GENERAL.—The United States and the Nations may be joined in an action filed in the United States District Court for the Western District of Oklahoma.

(B) UNITED STATES IMMUNITY.—Any claim by the United States to sovereign immunity from suit is irrevocably waived for any action brought by the State, the Chickasaw Nation, the Choctaw Nation, the City, or the Trust in the Western District of Oklahoma relating to interpretation or enforcement of the Settlement Agreement or this section, including of the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit and the Supreme Court of the United States.

(C) CHICKASAW NATION IMMUNITY.—For the exclusive benefit of the State (including the OWRB), the City, the Trust, the Choctaw Nation, and the United States, the sovereign immunity of the Chickasaw Nation from suit is waived solely for any action brought in the Western District of Oklahoma relating to interpretation or enforcement of the Settlement Agreement or this section, if the action is brought by the State or the OWRB, the City, the Trust, the Choctaw Nation, or the United States, including the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit and the Supreme Court of the United States.

(D) CHOCTAW NATION IMMUNITY.—For the exclusive benefit of the State (including of the OWRB), the City, the Trust, the Chickasaw Nation, and the United States, the Choctaw Nation shall expressly and irrevocably consent to a suit and waive sovereign immunity from a suit solely for any action brought in the Western District of Oklahoma relating to interpretation or enforcement of the Settlement Agreement or this section, if the action is brought by the State, the OWRB, the City, the Trust, the Chickasaw Nation, or the United States, including the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit and the Supreme Court of the United States.

(k) DISCLAIMER.—

(1) IN GENERAL.—The Settlement Agreement applies only to the claims and rights of the Nations.

(2) NO PRECEDENT.—Nothing in this section or the Settlement Agreement shall be construed in any way to quantify, establish, or serve as precedent regarding the land and water rights, claims, or entitlements to water of any American Indian Tribe other than the Nations, including any other American Indian Tribe in the State.

(3) LIMITATION.—Nothing in the Settlement Agreement—

(A) affects the ability of the United States, acting as sovereign, to take actions authorized by law, including any laws related to health, safety, or the environment, including—

(i) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(ii) the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.); and

(iv) any regulations implementing the Acts described in this section;

(B) affects the ability of the United States to raise defenses based on 43 U.S.C. 666(a); and

(C) affects any rights, claims, or defenses the United States may have with respect to the use of water on Federal lands in the Settlement Area that are not trust lands or Allotments.

Subtitle G—Blackfeet Water Rights Settlement

Blackfeet Water Rights Settlement Act.

SEC. 3701. SHORT TITLE.

This subtitle may be cited as the "Blackfeet Water Rights Settlement Act".

SEC. 3702. PURPOSES.

The purposes of this subtitle are—

(1) to achieve a fair, equitable, and final settlement of claims to water rights in the State of Montana for—

(A) the Blackfeet Tribe of the Blackfeet Indian Reservation; and

(B) the United States, for the benefit of the Tribe and allottees;

(2) to authorize, ratify, and confirm the water rights compact entered into by the Tribe and the State, to the extent that the Compact is consistent with this subtitle;

(3) to authorize and direct the Secretary of the Interior—

(A) to execute the Compact; and

(B) to take any other action necessary to carry out the Compact in accordance with this subtitle; and

(4) to authorize funds necessary for the implementation of the Compact and this subtitle.

SEC. 3703. DEFINITIONS.

In this subtitle:

(1) ALLOTTEE.—The term "allottee" means any individual who holds a beneficial real property interest in an allotment of Indian land that is—

(A) located within the Reservation; and

(B) held in trust by the United States.

(2) BIRCH CREEK AGREEMENT.—The term "Birch Creek Agreement" means—

(A) the agreement between the Tribe and the State regarding Birch Creek water use dated January 31, 2008 (as amended on February 13, 2009); and

(B) any amendment or exhibit (including exhibit amendments) to that agreement that is executed in accordance with this subtitle.

(3) BLACKFEET IRRIGATION PROJECT.—The term "Blackfeet Irrigation Project" means the irrigation project authorized by the matter under the heading "Montana" of title II of the Act of March 1, 1907 (34 Stat. 1035, chapter 2285), and administered by the Bureau of Indian Affairs.

(4) COMPACT.—The term "Compact" means—

(A) the Blackfeet-Montana water rights compact dated April 15, 2009, as contained in section 85–20–1501 of the Montana Code Annotated (2015); and

(B) any amendment or exhibit (including exhibit amendments) to the Compact that is executed to make the Compact consistent with this subtitle.

(5) ENFORCEABILITY DATE.—The term "enforceability date" means the date described in section 3720(f).

(6) LAKE ELWELL.—The term "Lake Elwell" means the water impounded on the Marias River in the State by Tiber Dam, a feature of the Lower Marias Unit of the Pick-Sloan Missouri River Basin Program authorized by section 9 of the Act of December 22, 1944 (commonly known as the "Flood Control Act of 1944") (58 Stat. 891, chapter 665).

(7) MILK RIVER BASIN.—The term "Milk River Basin" means the North Fork, Middle Fork, South Fork, and main stem of the Milk River and tributaries, from the headwaters to the confluence with the Missouri River.

(8) MILK RIVER PROJECT.—

(A) IN GENERAL.—The term "Milk River Project" means the Bureau of Reclamation project conditionally approved by the Secretary on March 14, 1903, pursuant to the Act of June 17, 1902 (32 Stat. 388, chapter 1093), commencing at Lake Sherburne Reservoir and providing water to a point approximately 6 miles east of Nashua, Montana.

(B) INCLUSIONS.—The term "Milk River Project" includes—

(i) the St. Mary Unit;

(ii) the Fresno Dam and Reservoir; and

(iii) the Dodson pumping unit.

(9) MILK RIVER PROJECT WATER RIGHTS.—The term "Milk River Project water rights" means the water rights held by the Bureau of Reclamation on behalf of the Milk River Project, as finally adjudicated by the Montana Water Court.

(10) MILK RIVER WATER RIGHT.—The term "Milk River water right" means the portion of the Tribal water rights described in article III.F of the Compact and this subtitle.

(11) MISSOURI RIVER BASIN.—The term "Missouri River Basin" means the hydrologic basin of the Missouri River (including tributaries).

(12) MR&I SYSTEM.—The term "MR&I System" means the intake, treatment, pumping, storage, pipelines, appurtenant items, and any other feature of the system, as generally described in the document entitled "Blackfeet Regional Water System", prepared by DOWL HKM, and dated June 2010, and modified by DOWL HKM, as set out in the addendum to the report dated March 2013.

(13) OM&R.—The term "OM&R" means—

(A) any recurring or ongoing activity associated with the day-to-day operation of a project;

(B) any activity relating to scheduled or unscheduled maintenance of a project; and

(C) any activity relating to replacing a feature of a project.

(14) RESERVATION.—The term "Reservation" means the Blackfeet Indian Reservation of Montana, as—

(A) established by the Treaty of October 17, 1855 (11 Stat. 657); and

(B) modified by—

(i) the Executive order of July 5, 1873 (relating to the Blackfeet Reserve);

(ii) the Act of April 15, 1874 (18 Stat. 28, chapter 96);

(iii) the Executive order of August 19, 1874 (relating to the Blackfeet Reserve);

(iv) the Executive order of April 13, 1875 (relating to the Blackfeet Reserve);

(v) the Executive order of July 13, 1880 (relating to the Blackfeet Reserve);

(vi) the Agreement with the Blackfeet, ratified by the Act of May 1, 1888 (25 Stat. 113, chapter 213); and

(vii) the Agreement with the Blackfeet, ratified by the Act of June 10, 1896 (29 Stat. 353, chapter 398).

(15) ST. MARY RIVER WATER RIGHT.—The term "St. Mary River water right" means that portion of the Tribal water rights described in article III.G.1.a.i. of the Compact and this subtitle.

(16) ST. MARY UNIT.—

(A) IN GENERAL.—The term "St. Mary Unit" means the St. Mary Storage Unit of the Milk River Project authorized by Congress on March 25, 1905.

(B) INCLUSIONS.—The term "St. Mary Unit" includes—

(i) Sherburne Dam and Reservoir;

(ii) Swift Current Creek Dike;

(iii) Lower St. Mary Lake;

(iv) St. Mary Canal Diversion Dam; and

(v) St. Mary Canal and appurtenances.

(17) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(18) STATE.—The term "State" means the State of Montana.

(19) SWIFTCURRENT CREEK BANK STABILIZATION PROJECT.—The term "Swiftcurrent Creek Bank Stabilization Project" means the project to mitigate the physical and environmental problems associated with the St. Mary Unit from Sherburne Dam to the St. Mary River, as described in the report entitled "Boulder/Swiftcurrent Creek Stabilization Project, Phase II Investigations Report", prepared by DOWL HKM, and dated March 2012.

(20) TRIBAL WATER RIGHTS.—The term "Tribal water rights" means the water rights of the Tribe described in article III of the Compact and this subtitle, including—

(A) the Lake Elwell allocation provided to the Tribe under section 3709; and

(B) the instream flow water rights described in section 3719.

(21) TRIBE.—The term "Tribe" means the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana.

SEC. 3704. RATIFICATION OF COMPACT.

(a) RATIFICATION.—

(1) IN GENERAL.—As modified by this subtitle, the Compact is authorized, ratified, and confirmed.

(2) AMENDMENTS.—Any amendment to the Compact is authorized, ratified, and confirmed, to the extent that such amendment is executed to make the Compact consistent with this subtitle.

(b) EXECUTION.—

(1) IN GENERAL.—To the extent that the Compact does not conflict with this subtitle, the Secretary shall execute the Compact, including all exhibits to, or parts of, the Compact requiring the signature of the Secretary.

(2) MODIFICATIONS.—Nothing in this subtitle precludes the Secretary from approving any modification to an appendix or exhibit to the Compact that is consistent with this subtitle, to the extent that the modification does not otherwise require congressional approval under section 2116 of the Revised Statutes (25 U.S.C. 177) or any other applicable provision of Federal law.

(c) ENVIRONMENTAL COMPLIANCE.—

(1) IN GENERAL.—In implementing the Compact and this subtitle, the Secretary shall comply with all applicable provisions of—

(A) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(B) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(C) all other applicable environmental laws and regulations.

(2) EFFECT OF EXECUTION.—

(A) IN GENERAL.—The execution of the Compact by the Secretary under this section shall not constitute a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) COMPLIANCE.—The Secretary shall carry out all Federal compliance activities necessary to implement the Compact and this subtitle.

SEC. 3705. MILK RIVER WATER RIGHT.

(a) IN GENERAL.—With respect to the Milk River water right, the Tribe—

(1) may continue the historical uses and the uses in existence on the date of enactment of this Act; and

(2) except as provided in article III.F.1.d of the Compact, shall not develop new uses until the date on which—

(A) the Tribe has entered into the agreement described in subsection (c); or

(B) the Secretary has established the terms and conditions described in subsection (e).

(b) WATER RIGHTS ARISING UNDER STATE LAW.—With respect to any water rights arising under State law in the Milk River Basin owned or acquired by the Tribe, the Tribe—

(1) may continue any use in existence on the date of enactment of this Act; and

(2) shall not change any use until the date on which—

(A) the Tribe has entered into the agreement described in subsection (c); or

(B) the Secretary has established the terms and conditions described in subsection (e).

(c) TRIBAL AGREEMENT.—

(1) IN GENERAL.—In consultation with the Commissioner of Reclamation and the Director of the Bureau of Indian Affairs, the Tribe and the Fort Belknap Indian Community shall enter into an agreement to provide for the exercise of their respective water rights on the respective reservations of the Tribe and the Fort Belknap Indian Community in the Milk River.

(2) CONSIDERATIONS.—The agreement entered into under paragraph (1) shall take into consideration—

(A) the equal priority dates of the 2 Indian tribes;

(B) the water supplies of the Milk River; and

(C) historical, current, and future uses identified by each Indian tribe.

(d) SECRETARIAL DETERMINATION.—

(1) IN GENERAL.—Not later than 120 days after the date on which the agreement described in subsection (c) is submitted to the Secretary, the Secretary shall review and approve or disapprove the agreement.

(2) APPROVAL.—The Secretary shall approve the agreement if the Secretary finds that the agreement—

(A) equitably accommodates the interests of each Indian tribe in the Milk River;

(B) adequately considers the factors described in subsection (c)(2); and

(C) is otherwise in accordance with applicable law.

(3) DEADLINE EXTENSION.—The deadline to review the agreement described in paragraph (1) may be extended by the Secretary after consultation with the Tribe and the Fort Belknap Indian Community.

(e) SECRETARIAL DECISION.—

(1) IN GENERAL.—If the Tribe and the Fort Belknap Indian Community do not, by 3 years after the Secretary certifies under section 3720(f)(5) that the Tribal membership has approved the Compact and this subtitle, enter into an agreement approved under subsection d(2), the Secretary, in the Secretary's sole discretion, shall establish, after consultation with the Tribe and the Fort Belknap Indian Community, terms and conditions that reflect the considerations described in subsection (c)(2) by which the respective water rights of the Tribe and the Fort Belknap Indian Community in the Milk River may be exercised.

(2) CONSIDERATION AS FINAL AGENCY ACTION.—The establishment by the Secretary of terms and conditions under paragraph (1) shall be considered to be a final agency action for purposes of review under chapter 7 of title 5, United States Code.

(3) JUDICIAL REVIEW.—An action for judicial review pursuant to this section shall be brought by not later than the date that is 1 year after the date of notification of the establishment of the terms and conditions under this subsection.

(4) INCORPORATION INTO DECREES.—The agreement under subsection (c), or the decision of the Secretary under this subsection, shall be filed with the Montana Water Court, or the district court with jurisdiction, for incorporation into the final decrees of the Tribe and the Fort Belknap Indian Community.

(5) EFFECTIVE DATE.—The agreement under subsection (c) and a decision of the Secretary under this subsection—

(A) shall be effective immediately; and

(B) may not be modified absent—

(i) the approval of the Secretary; and

(ii) the consent of the Tribe and the Fort Belknap Indian Community.

(f) USE OF FUNDS.—The Secretary shall distribute equally the funds made available under section 3718(a)(2)(C)(ii) to the Tribe and the Fort Belknap Indian Community to use to reach an agreement under this section, including for technical analyses and legal and other related efforts.

SEC. 3706. WATER DELIVERY THROUGH MILK RIVER PROJECT.

(a) IN GENERAL.—Subject to the availability of appropriations, the Secretary, acting through the Commissioner of Reclamation, shall carry out the activities authorized under this section with respect to the St. Mary River water right.

(b) TREATMENT.—Notwithstanding article IV.D.4 of the Compact, any responsibility of the United States with respect to the St. Mary River water right shall be limited to, and fulfilled pursuant to—

(1) subsection (c) of this section; and

(2) subsection (b)(3) of section 3716 and subsection (a)(1)(C) of section 3718.

(c) WATER DELIVERY CONTRACT.—

(1) IN GENERAL.—Not later than 180 days after the enforceability date, the Secretary shall enter into a water delivery contract with the Tribe for the delivery of not greater than 5,000 acre-feet per year of the St. Mary River water right through Milk River Project facilities to the Tribe or another entity specified by the Tribe.

(2) TERMS AND CONDITIONS.—The contract under paragraph (1) shall establish the terms and conditions for the water deliveries described in paragraph (1) in accordance with the Compact and this subtitle.

(3) REQUIREMENTS.—The water delivery contract under paragraph (1) shall include provisions requiring that—

(A) the contract shall be without limit as to term;

(B) the Tribe, and not the United States, shall collect, and shall be entitled to, all consideration due to the Tribe under any lease, contract, or agreement entered into by the Tribe pursuant to subsection (f);

(C) the United States shall have no obligation to monitor, administer, or account for—

(i) any funds received by the Tribe as consideration under any lease, contract, or agreement entered into by the Tribe pursuant to subsection (f); or

(ii) the expenditure of such funds;

(D) if water deliveries under the contract are interrupted for an extended period of time because of damage to, or a reduction in the capacity of, St. Mary Unit facilities, the rights of the Tribe shall be treated in the same manner as the rights of other contractors receiving water deliveries through the Milk River Project with respect to the water delivered under this section;

(E) deliveries of water under this section shall be—

(i) limited to not greater than 5,000 acre-feet of water in any 1 year;

(ii) consistent with operations of the Milk River Project and without additional costs to the Bureau of Reclamation, including OM&R costs; and

(iii) without additional cost to the Milk River Project water users; and

(F) the Tribe shall be required to pay OM&R for water delivered under this section.

(d) SHORTAGE SHARING OR REDUCTION.—

(1) IN GENERAL.—The 5,000 acre-feet per year of water delivered under paragraph (3)(E)(i) of subsection (c) shall not be subject to shortage sharing or reduction, except as provided in paragraph (3)(D) of that subsection.

(2) NO INJURY TO MILK RIVER PROJECT WATER USERS.—Notwithstanding article IV.D.4 of the Compact, any reduction in the Milk River Project water supply caused by the delivery of water under subsection (c) shall not constitute injury to Milk River Project water users.

(e) SUBSEQUENT CONTRACTS.—

(1) IN GENERAL.—As part of the studies authorized by section 3707(c)(1), the Secretary, acting through the Commissioner of Reclamation, and in cooperation with the Tribe, shall identify alternatives to provide to the Tribe water from the St. Mary River water right in quantities greater than the 5,000 acre-feet per year of water described in subsection (c)(3)(E)(i).

(2) CONTRACT FOR WATER DELIVERY.—If the Secretary determines under paragraph (1) that more than 5,000 acre-feet per year of the St. Mary River water right can be delivered to the Tribe, the Secretary shall offer to enter into 1 or more contracts with the Tribe for the delivery of that water, subject to the requirements of subsection (c)(3) (except subsection (c)(3)(E)(i)) and this subsection.

(3) TREATMENT.—Any delivery of water under this subsection shall be subject to reduction in the same manner as for Milk River Project contract holders.

(f) SUBCONTRACTS.—

(1) IN GENERAL.—The Tribe may enter into any subcontract for the delivery of water under this section to a third party, in accordance with section 3715(e).

(2) COMPLIANCE WITH OTHER LAW.—All subcontracts described in paragraph (1) shall comply with—

(A) this subtitle;

(B) the Compact;

(C) the tribal water code; and

(D) other applicable law.

(3) NO LIABILITY.—The Secretary shall not be liable to any party, including the Tribe, for any term of, or any loss or other detriment resulting from, a lease, contract, or other agreement entered into pursuant to this subsection.

(g) EFFECT OF PROVISIONS.—Nothing in this section—

(1) precludes the Tribe from taking the water described in subsection (c)(3)(E)(i), or any additional water provided under subsection (e), from the direct flow of the St. Mary River; or

(2) modifies the quantity of the Tribal water rights described in article III.G.1. of the Compact.

(h) OTHER RIGHTS.—Notwithstanding the requirements of article III.G.1.d of the Compact, after satisfaction of all water rights under State law for use of St. Mary River water, including the Milk River Project water rights, the Tribe shall have the right to the remaining portion of the share of the United States in the St. Mary River under the International Boundary Waters Treaty of 1909 (36 Stat. 2448) for any tribally authorized use or need consistent with this subtitle.

SEC. 3707. BUREAU OF RECLAMATION ACTIVITIES TO IMPROVE WATER MANAGEMENT.

(a) MILK RIVER PROJECT PURPOSES.—The purposes of the Milk River Project shall include—

(1) irrigation;

(2) flood control;

(3) the protection of fish and wildlife;

(4) recreation;

(5) the provision of municipal, rural, and industrial water supply; and

(6) hydroelectric power generation.

(b) USE OF MILK RIVER PROJECT FACILITIES FOR THE BENEFIT OF TRIBE.—The use of Milk River Project facilities to transport water for the Tribe pursuant to subsections (c) and (e) of section 3706, together with any use by the Tribe of that water in accordance with this subtitle—

(1) shall be considered to be an authorized purpose of the Milk River Project; and

(2) shall not change the priority date of any Tribal water rights.

(c) ST. MARY RIVER STUDIES.—

(1) IN GENERAL.—Subject to the availability of appropriations, the Secretary, in cooperation with the Tribe and the State, shall conduct—

(A) an appraisal study—

(i) to develop a plan for the management and development of water supplies in the St. Mary River Basin and Milk River Basin, including the St. Mary River and Milk River water supplies for the Tribe and the Milk River water supplies for the Fort Belknap Indian Community; and

(ii) to identify alternatives to develop additional water of the St. Mary River for the Tribe; and

(B) a feasibility study—

(i) using the information resulting from the appraisal study conducted under subparagraph (A) and such other information as is relevant, to evaluate the feasibility of—

(I) alternatives for the rehabilitation of the St. Mary Diversion Dam and Canal; and

(II) increased storage in Fresno Dam and Reservoir; and

(ii) to create a cost allocation study that is based on the authorized purposes described in subsections (a) and (b).

(2) COOPERATIVE AGREEMENT.—On request of the Tribe, the Secretary shall enter into a cooperative agreement with the Tribe with respect to the portion of the appraisal study described in paragraph (1)(A).

(3) COSTS NONREIMBURSABLE.—The cost of the studies under this subsection shall not be—

(A) considered to be a cost of the Milk River Project; or

(B) reimbursable in accordance with the reclamation laws.

(d) SWIFTCURRENT CREEK BANK STABILIZATION.—

(1) IN GENERAL.—Subject to the availability of appropriations, the Secretary, acting through the Commissioner of Reclamation, shall carry out appropriate activities concerning the Swiftcurrent Creek Bank Stabilization Project, including—

(A) a review of the final project design; and

(B) value engineering analyses.

(2) MODIFICATION OF FINAL DESIGN.—Prior to beginning construction activities for the Swiftcurrent Creek Bank Stabilization Project, on the basis of the review conducted under paragraph (1), the Secretary shall negotiate with the Tribe appropriate changes, if any, to the final design—

(A) to ensure compliance with applicable industry standards;

(B) to improve the cost-effectiveness of the Swiftcurrent Creek Bank Stabilization Project; and

(C) to ensure that the Swiftcurrent Creek Bank Stabilization Project may be constructed using only the amounts made available under section 3718.

(3) APPLICABILITY OF ISDEAA.—At the request of the Tribe, and in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.), the Secretary shall enter into 1 or more agreements with the Tribe to carry out the Swiftcurrent Bank Stabilization Project.

(e) ADMINISTRATION.—The Commissioner of Reclamation and the Tribe shall negotiate the cost of any oversight activity carried out by the Bureau of Reclamation under any agreement entered into under this section, subject to the condition that the total cost for the oversight shall not exceed 4 percent of the total costs incurred under this section.

(f) MILK RIVER PROJECT RIGHTS-OF-WAY AND EASEMENTS.—

(1) IN GENERAL.—Subject to paragraphs (2) and (3), the Tribe shall grant the United States a right-of-way on Reservation land owned by the Tribe for all uses by the Milk River Project (permissive or otherwise) in existence as of December 31, 2015, including all facilities, flowage easements, and access easements necessary for the operation and maintenance of the Milk River Project.

(2) AGREEMENT REGARDING EXISTING USES.—The Tribe and the Secretary shall enter into an agreement for a process to determine the location, nature, and extent of the existing uses referenced in this subsection. The agreement shall require that—

(A) a panel of three individuals determine the location, nature, and extent of existing uses necessary for the operation and maintenance of the Milk River Project (the "Panel

Determination"), with the Tribe appointing one representative of the Tribe, the Secretary appointing one representative of the Secretary, and those two representatives jointly appointing a third individual;

(B) if the Panel Determination is unanimous, the Tribe grant a right-of-way to the United States for the existing uses identified in the Panel Determination in accordance with applicable law without additional compensation;

(C) if the Panel Determination is not unanimous—

(i) the Secretary adopt the Panel Determination with any amendments the Secretary reasonably determines necessary to correct any clear error (the "Interior Determination"), provided that if any portion of the Panel Determination is unanimous, the Secretary will not amend that portion; and

(ii) the Tribe grant a right-of-way to the United States for the existing uses identified in the Interior Determination in accordance with applicable law without additional compensation, with the agreement providing for the timing of the grant to take into consideration the possibility of review under paragraph (5).

(3) EFFECT.—Determinations made under this subsection—

(A) do not address title as between the United States and the Tribe; and

(B) do not apply to any new use of Reservation land by the United States for the Milk River Project after December 31, 2015.

(4) INTERIOR DETERMINATION AS FINAL AGENCY ACTION.—Any determination by the Secretary under paragraph (2)(C) shall be considered to be a final agency action for purposes of review under chapter 7 of title 5, United States Code.

(5) JUDICIAL REVIEW.—An action for judicial review pursuant to this section shall be brought by not later than the date that is 1 year after the date of notification of the Interior Determination.

(g) FUNDING.—The total amount of obligations incurred by the Secretary, prior to any adjustment provided for in section 3718, shall not exceed—

(1) $3,800,000 to carry out subsection (c);

(2) $20,700,000 to carry out subsection (d); and

(3) $3,100,000 to carry out subsection (f).

SEC. 3708. ST. MARY CANAL HYDROELECTRIC POWER GENERATION.

(a) BUREAU OF RECLAMATION JURISDICTION.—Effective beginning on the date of enactment of this Act, the Commissioner of Reclamation shall have exclusive jurisdiction to authorize the development of hydropower on the St. Mary Unit.

(b) RIGHTS OF TRIBE.—

(1) EXCLUSIVE RIGHT OF TRIBE.—Subject to paragraph (2) and notwithstanding any other provision of law, the Tribe shall have the exclusive right to develop and market hydroelectric power of the St. Mary Unit.

(2) LIMITATIONS.—The exclusive right described in paragraph (1)—

(A) shall expire on the date that is 15 years after the date of enactment of an Act appropriating funds for rehabilitation of the St. Mary Unit; but

(B) may be extended by the Secretary at the request of the Tribe.

(3) OM&R COSTS.—Effective beginning on the date that is 10 years after the date on which the Tribe begins marketing hydroelectric power generated from the St. Mary Unit to any third party, the Tribe shall make annual payments for OM&R costs attributable to the direct use of any facilities by the Tribe for hydroelectric power generation, in amounts determined in accordance with the guidelines and methods of the Bureau of Reclamation for assessing OM&R charges.

(c) BUREAU OF RECLAMATION COOPERATION.—The Commissioner of Reclamation shall cooperate with the Tribe in the development of any hydroelectric power generation project under this section.

(d) AGREEMENT.—Before construction of a hydroelectric power generation project under this section, the Tribe shall enter into an agreement with the Commissioner of Reclamation that includes provisions—

(1) requiring that—

(A) the design, construction, and operation of the project shall be consistent with the Bureau of Reclamation guidelines and methods for hydroelectric power development at Bureau facilities, as appropriate; and

(B) the hydroelectric power generation project will not impair the efficiencies of the Milk River Project for authorized purposes;

(2) regarding construction and operating criteria and emergency procedures; and

(3) under which any modification proposed by the Tribe to a facility owned by the Bureau of Reclamation shall be subject to review and approval by the Secretary, acting through the Commissioner of Reclamation.

(e) USE OF HYDROELECTRIC POWER BY TRIBE.—Any hydroelectric power generated in accordance with this section shall be used or marketed by the Tribe.

(f) REVENUES.—The Tribe shall collect and retain any revenues from the sale of hydroelectric power generated by a project under this section.

(g) LIABILITY OF UNITED STATES.—The United States shall have no obligation to monitor, administer, or account for—

(1) any revenues received by the Tribe under this section; or

(2) the expenditure of those revenues.

(h) PREFERENCE.—During any period for which the exclusive right of the Tribe described in subsection (b)(1) is not in effect, the Tribe shall have a preference to develop hydropower on the St. Mary Unit facilities, in accordance with Bureau of Reclamation guidelines and methods for hydroelectric power development at Bureau facilities.

SEC. 3709. STORAGE ALLOCATION FROM LAKE ELWELL.

(a)(1) STORAGE ALLOCATION TO TRIBE.—The Secretary shall allocate to the Tribe 45,000 acre-feet per year of water stored in Lake Elwell for use by the Tribe for any beneficial purpose on or off the Reservation, under a water right held by the United States and managed by the Bureau of Reclamation, as measured

at the outlet works of Tiber Dam or through direct pumping from Lake Elwell.

(2) REDUCTION.—Up to 10,000 acre-feet per year of water allocated to the Tribe pursuant to paragraph (1) will be subject to an acre-foot for acre-foot reduction if depletions from the Tribal water rights above Lake Elwell exceed 88,000 acre-feet per year of water because of New Development (as defined in article II.37 of the Compact).

(b) TREATMENT.—

(1) IN GENERAL.—The allocation to the Tribe under subsection (a) shall be considered to be part of the Tribal water rights.

(2) PRIORITY DATE.—The priority date of the allocation to the Tribe under subsection (a) shall be the priority date of the Lake Elwell water right held by the Bureau of Reclamation.

(3) ADMINISTRATION.—The Tribe shall administer the water allocated under subsection (a) in accordance with the Compact and this subtitle.

(c) ALLOCATION AGREEMENT.—

(1) IN GENERAL.—As a condition of receiving an allocation under this section, the Tribe shall enter into an agreement with the Secretary to establish the terms and conditions of the allocation, in accordance with the Compact and this subtitle.

(2) INCLUSIONS.—The agreement under paragraph (1) shall include provisions establishing that—

(A) the agreement shall be without limit as to term;

(B) the Tribe, and not the United States, shall be entitled to all consideration due to the Tribe under any lease, contract, or agreement entered into by the Tribe pursuant to subsection (d);

(C) the United States shall have no obligation to monitor, administer, or account for—

(i) any funds received by the Tribe as consideration under any lease, contract, or agreement entered into by the Tribe pursuant to subsection (d); or

(ii) the expenditure of those funds;

(D) if the capacity or function of Lake Elwell facilities are significantly reduced, or are anticipated to be significantly reduced, for an extended period of time, the Tribe shall have the same rights as other storage contractors with respect to the allocation under this section;

(E) the costs associated with the construction of the storage facilities at Tiber Dam allocable to the Tribe shall be nonreimbursable;

(F) no water service capital charge shall be due or payable for any water allocated to the Tribe pursuant to this section or the allocation agreement, regardless of whether that water is delivered for use by the Tribe or under a lease, contract, or by agreement entered into by the Tribe pursuant to subsection (d);

(G) the Tribe shall not be required to make payments to the United States for any water allocated to the Tribe under this subtitle or the allocation agreement, except for each acre-foot of stored water leased or transferred for industrial purposes as described in subparagraph (H);

(H) for each acre-foot of stored water leased or transferred by the Tribe for industrial purposes—

(i) the Tribe shall pay annually to the United States an amount necessary to cover the proportional share of the annual OM&R costs allocable to the quantity of water leased or transferred by the Tribe for industrial purposes; and

(ii) the annual payments of the Tribe shall be reviewed and adjusted, as appropriate, to reflect the actual OM&R costs for Tiber Dam; and

(I) the adjustment process identified in subsection (a)(2) will be based on specific enumerated provisions.

(d) AGREEMENTS BY TRIBE.—The Tribe may use, lease, contract, exchange, or enter into other agreements for use of the water allocated to the Tribe under subsection (a), if—

(1) the use of water that is the subject of such an agreement occurs within the Missouri River Basin; and

(2) the agreement does not permanently alienate any portion of the water allocated to the Tribe under subsection (a).

(e) EFFECTIVE DATE.—The allocation under subsection (a) takes effect on the enforceability date.

(f) NO CARRYOVER STORAGE.—The allocation under subsection (a) shall not be increased by any year-to-year carryover storage.

(g) DEVELOPMENT AND DELIVERY COSTS.—The United States shall not be required to pay the cost of developing or delivering any water allocated under this section.

SEC. 3710. IRRIGATION ACTIVITIES.

(a) IN GENERAL.—Subject to the availability of appropriations, the Secretary, acting through the Commissioner of Reclamation and in accordance with subsection (c), shall carry out the following actions relating to the Blackfeet Irrigation Project:

(1) Deferred maintenance.

(2) Dam safety improvements for Four Horns Dam.

(3) Rehabilitation and enhancement of the Four Horns Feeder Canal, Dam, and Reservoir.

(b) LEAD AGENCY.—The Bureau of Reclamation shall serve as the lead agency with respect to any activities carried out under this section.

(c) SCOPE OF DEFERRED MAINTENANCE ACTIVITIES AND FOUR HORNS DAM SAFETY IMPROVEMENTS.—

(1) IN GENERAL.—Subject to the conditions described in paragraph (2), the scope of the deferred maintenance activities and Four Horns Dam safety improvements shall be as generally described in—

(A) the document entitled "Engineering Evaluation and Condition Assessment, Blackfeet Irrigation Project", prepared by DOWL HKM, and dated August 2007; and

(B) the provisions relating to Four Horns Rehabilitated Dam of the document entitled "Four Horns Dam Enlarged Appraisal Evaluation Design Report", prepared by DOWL HKM, and dated April 2007.

(2) CONDITIONS.—The conditions referred to in paragraph (1) are that, before commencing construction activities, the Secretary shall—

(A) review the design of the proposed rehabilitation or improvement;

(B) perform value engineering analyses;

(C) perform appropriate Federal environmental compliance activities; and

(D) ensure that the deferred maintenance activities and dam safety improvements may be constructed using only the amounts made available under section 3718.

(d) SCOPE OF REHABILITATION AND ENHANCEMENT OF FOUR HORNS FEEDER CANAL, DAM, AND RESERVOIR.—

(1) IN GENERAL.—The scope of the rehabilitation and improvements shall be as generally described in the document entitled "Four Horns Feeder Canal Rehabilitation with Export", prepared by DOWL HKM, and dated April 2013, subject to the condition that, before commencing construction activities, the Secretary shall—

(A) review the design of the proposed rehabilitation or improvement;

(B) perform value engineering analyses;

(C) perform appropriate Federal environmental compliance activities; and

(D) ensure that the rehabilitation and improvements may be constructed using only the amounts made available under section 3718.

(2) INCLUSIONS.—The activities carried out by the Secretary under this subsection shall include—

(A) the rehabilitation or improvement of the Four Horns feeder canal system to a capacity of not fewer than 360 cubic feet per second;

(B) the rehabilitation or improvement of the outlet works of Four Horns Dam and Reservoir to deliver not less than 15,000 acre-feet of water per year, in accordance with subparagraph (C); and

(C) construction of facilities to deliver not less than 15,000 acre-feet of water per year from Four Horns Dam and Reservoir, to a point on or near Birch Creek to be designated by the Tribe and the State for delivery of water to the water delivery system of the Pondera County Canal and Reservoir Company on Birch Creek, in accordance with the Birch Creek Agreement.

(3) NEGOTIATION WITH TRIBE.—On the basis of the review described in paragraph (1)(A), the Secretary shall negotiate with the Tribe appropriate changes to the final design of any activity under this subsection to ensure that the final design meets applicable industry standards.

(e) FUNDING.—The total amount of obligations incurred by the Secretary in carrying out this section, prior to any adjustment provided for in section 3718, shall not exceed $54,900,000, of which—

(1) $40,900,000 shall be allocated to carry out the activities described in subsection (c); and

(2) $14,000,000 shall be allocated to carry out the activities described in subsection (d)(2).

(f) NONREIMBURSABILITY OF COSTS.—All costs incurred by the Secretary in carrying out this section shall be nonreimbursable.

(g) NON-FEDERAL CONTRIBUTION.—No part of the project under subsection (d) shall be commenced until the State has made available $20,000,000 to carry out the activities described in subsection (d)(2).

(h) ADMINISTRATION.—The Commissioner of Reclamation and the Tribe shall negotiate the cost of any oversight activity carried out by the Bureau of Reclamation under any agreement entered into under subsection (m), subject to the condition that the total cost for the oversight shall not exceed 4 percent of the total project costs for each project.

(i) PROJECT EFFICIENCIES.—If the total cost of planning, design, and construction activities relating to the projects described in this section results in cost savings and is less than the amounts authorized to be obligated, the Secretary, at the request of the Tribe, may—

(1) use those cost savings to carry out a project described in section 3707(d), 3711, 3712, or 3713; or

(2) deposit those cost savings to the Blackfeet OM&R Trust Account.

(j) OWNERSHIP BY TRIBE OF BIRCH CREEK DELIVERY FACILITIES.—Notwithstanding any other provision of law, the Secretary shall transfer to the Tribe, at no cost, title in and to the facilities constructed under subsection (d)(2)(C).

(k) OWNERSHIP, OPERATION, AND MAINTENANCE.—On transfer to the Tribe of title under subsection (j), the Tribe shall—

(1) be responsible for OM&R in accordance with the Birch Creek Agreement; and

(2) enter into an agreement with the Bureau of Indian Affairs regarding the operation of the facilities described in that subsection.

(l) LIABILITY OF UNITED STATES.—The United States shall have no obligation or responsibility with respect the facilities described in subsection (d)(2)(C).

(m) APPLICABILITY OF ISDEAA.—At the request of the Tribe, and in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.), the Secretary shall enter into 1 or more agreements with the Tribe to carry out this section.

(n) EFFECT.—Nothing in this section—

(1) alters any applicable law (including regulations) under which the Bureau of Indian Affairs collects assessments or carries out Blackfeet Irrigation Project OM&R; or

(2) impacts the availability of amounts made available under subsection (a)(1)(B) of section 3718.

SEC. 3711. DESIGN AND CONSTRUCTION OF MR&I SYSTEM.

(a) IN GENERAL.—Subject to the availability of appropriations, the Secretary, acting through the Commissioner of Reclamation, shall plan, design, and construct the water diversion and delivery features of the MR&I System in accordance with 1 or more agreements between the Secretary and the Tribe.

(b) LEAD AGENCY.—The Bureau of Reclamation shall serve as the lead agency with respect to any activity to design and construct the water diversion and delivery features of the MR&I System.

(c) SCOPE.—

(1) IN GENERAL.—The scope of the design and construction under this section shall be as generally described in the document entitled "Blackfeet Regional Water System", prepared by DOWL HKM, dated June 2010, and modified by DOWL HKM in the addendum to the report dated March 2013, subject

to the condition that, before commencing final design and construction activities, the Secretary shall—

(A) review the design of the proposed rehabilitation and construction;

(B) perform value engineering analyses; and

(C) perform appropriate Federal compliance activities.

(2) NEGOTIATION WITH TRIBE.—On the basis of the review described in paragraph (1)(A), the Secretary shall negotiate with the Tribe appropriate changes, if any, to the final design—

(A) to ensure that the final design meets applicable industry standards;

(B) to improve the cost-effectiveness of the delivery of MR&I System water; and

(C) to ensure that the MR&I System may be constructed using only the amounts made available under section 3718.

(d) NONREIMBURSABILITY OF COSTS.—All costs incurred by the Secretary in carrying out this section shall be nonreimbursable.

(e) FUNDING.—The total amount of obligations incurred by the Secretary in carrying out this section, prior to any adjustment provided for in section 3718, shall not exceed $76,200,000.

(f) NON-FEDERAL CONTRIBUTION.—

(1) CONSULTATION.—Before completion of the final design of the MR&I System required by subsection (c), the Secretary shall consult with the Tribe, the State, and other affected non-Federal parties to discuss the possibility of receiving non-Federal contributions for the cost of the MR&I System.

(2) NEGOTIATIONS.—If, based on the extent to which non-Federal parties are expected to use the MR&I System, a non-Federal contribution to the MR&I System is determined by the parties described in paragraph (1) to be appropriate, the Secretary shall initiate negotiations for an agreement regarding the means by which the contributions shall be provided.

(g) OWNERSHIP BY TRIBE.—Title to the MR&I System and all facilities rehabilitated or constructed under this section shall be held by the Tribe.

(h) ADMINISTRATION.—The Commissioner of Reclamation and the Tribe shall negotiate the cost of any oversight activity carried out by the Bureau of Reclamation under any agreement entered into under this section, subject to the condition that the total cost for the oversight shall not exceed 4 percent of the total costs incurred under this section.

(i) OM&R COSTS.—The Federal Government shall have no obligation to pay for the OM&R costs for any facility rehabilitated or constructed under this section.

(j) PROJECT EFFICIENCIES.—If the total cost of planning, design, and construction activities relating to the projects described in this section results in cost savings and is less than the amounts authorized to be obligated, the Secretary, at the request of the Tribe, may—

(1) use those cost savings to carry out a project described in section 3707(d), 3710, 3712, or 3713; or

(2) deposit those cost savings to the Blackfeet OM&R Trust Account.

(k) APPLICABILITY OF ISDEAA.—At the request of the Tribe, and in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.), the Secretary shall

enter into 1 or more agreements with the Tribe to carry out this section.

SEC. 3712. DESIGN AND CONSTRUCTION OF WATER STORAGE AND IRRIGATION FACILITIES.

(a) IN GENERAL.—Subject to the availability of appropriations, the Secretary, acting through the Commissioner of Reclamation, shall plan, design, and construct 1 or more facilities to store water and support irrigation on the Reservation in accordance with 1 or more agreements between the Secretary and the Tribe.

(b) LEAD AGENCY.—The Bureau of Reclamation shall serve as the lead agency with respect to any activity to design and construct the irrigation development and water storage facilities described in subsection (c).

(c) SCOPE.—

(1) IN GENERAL.—The scope of the design and construction under this section shall be as generally described in the document entitled "Blackfeet Water Storage, Development, and Project Report", prepared by DOWL HKM, and dated March 13, 2013, as modified and agreed to by the Secretary and the Tribe, subject to the condition that, before commencing final design and construction activities, the Secretary shall—

(A) review the design of the proposed construction;

(B) perform value engineering analyses; and

(C) perform appropriate Federal compliance activities.

(2) MODIFICATION.—The Secretary may modify the scope of construction for the projects described in the document referred to in paragraph (1), if—

(A) the modified project is—

(i) similar in purpose to the proposed projects; and

(ii) consistent with the purposes of this subtitle; and

(B) the Secretary has consulted with the Tribe regarding any modification.

(3) NEGOTIATION WITH TRIBE.—On the basis of the review described in paragraph (1)(A), the Secretary shall negotiate with the Tribe appropriate changes, if any, to the final design—

(A) to ensure that the final design meets applicable industry standards;

(B) to improve the cost-effectiveness of any construction; and

(C) to ensure that the projects may be constructed using only the amounts made available under section 3718.

(d) NONREIMBURSABILITY OF COSTS.—All costs incurred by the Secretary in carrying out this section shall be nonreimbursable.

(e) FUNDING.—The total amount of obligations incurred by the Secretary in carrying out this section, prior to any adjustment provided for in section 3718, shall not exceed $87,300,000.

(f) OWNERSHIP BY TRIBE.—Title to all facilities rehabilitated or constructed under this section shall be held by the Tribe, except that title to the Birch Creek Unit of the Blackfeet Indian Irrigation Project shall remain with the Bureau of Indian Affairs.

(g) ADMINISTRATION.—The Commissioner of Reclamation and the Tribe shall negotiate the cost of any oversight activity carried out by the Bureau of Reclamation under any agreement entered into under this section, subject to the condition that the total

cost for the oversight shall not exceed 4 percent of the total costs incurred under this section.

(h) OM&R COSTS.—The Federal Government shall have no obligation to pay for the OM&R costs for the facilities rehabilitated or constructed under this section.

(i) PROJECT EFFICIENCIES.—If the total cost of planning, design, and construction activities relating to the projects described in this section results in cost savings and is less than the amounts authorized to be obligated, the Secretary, at the request of the Tribe, may—

(1) use those cost savings to carry out a project described in section 3707(d), 3710, 3711, or 3713; or

(2) deposit those cost savings to the Blackfeet OM&R Trust Account.

(j) APPLICABILITY OF ISDEAA.—At the request of the Tribe, and in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.), the Secretary shall enter into 1 or more agreements with the Tribe to carry out this section.

SEC. 3713. BLACKFEET WATER, STORAGE, AND DEVELOPMENT PROJECTS.

(a) IN GENERAL.—

(1) SCOPE.—The scope of the construction under this section shall be as generally described in the document entitled "Blackfeet Water Storage, Development, and Project Report", prepared by DOWL HKM, and dated March 13, 2013, as modified and agreed to by the Secretary and the Tribe.

(2) MODIFICATION.—The Tribe may modify the scope of the projects described in the document referred to in paragraph (1) if—

(A) the modified project is—

(i) similar to the proposed project; and

(ii) consistent with the purposes of this subtitle; and

(B) the modification is approved by the Secretary.

(b) NONREIMBURSABILITY OF COSTS.—All costs incurred by the Secretary in carrying out this section shall be nonreimbursable.

(c) FUNDING.—The total amount of obligations incurred by the Secretary in carrying out this section, prior to any adjustment provided for in section 3718, shall not exceed $91,000,000.

(d) OM&R COSTS.—The Federal Government shall have no obligation to pay for the OM&R costs for the facilities rehabilitated or constructed under this section.

(e) OWNERSHIP BY TRIBE.—Title to any facility constructed under this section shall be held by the Tribe.

SEC. 3714. EASEMENTS AND RIGHTS-OF-WAY.

(a) TRIBAL EASEMENTS AND RIGHTS-OF-WAY.—

(1) IN GENERAL.—On request of the Secretary, the Tribe shall grant, at no cost to the United States, such easements and rights-of-way over tribal land as are necessary for the construction of the projects authorized by sections 3710 and 3711.

(2) JURISDICTION.—An easement or right-of-way granted by the Tribe pursuant to paragraph (1) shall not affect in any respect the civil or criminal jurisdiction of the Tribe over the easement or right-of-way.

(b) LANDOWNER EASEMENTS AND RIGHTS-OF-WAY.—In partial consideration for the construction activities authorized by section 3711, and as a condition of receiving service from the MR&I System, a landowner shall grant, at no cost to the United States or the Tribe, such easements and rights-of-way over the land of the landowner as may be necessary for the construction of the MR&I System.

(c) LAND ACQUIRED BY UNITED STATES OR TRIBE.—Any land acquired within the boundaries of the Reservation by the United States on behalf of the Tribe, or by the Tribe on behalf of the Tribe, in connection with achieving the purposes of this subtitle shall be held in trust by the United States for the benefit of the Tribe.

SEC. 3715. TRIBAL WATER RIGHTS.

(a) CONFIRMATION OF TRIBAL WATER RIGHTS.—

(1) IN GENERAL.—The Tribal water rights are ratified, confirmed, and declared to be valid.

(2) USE.—Any use of the Tribal water rights shall be subject to the terms and conditions of the Compact and this subtitle.

(3) CONFLICT.—In the event of a conflict between the Compact and this subtitle, the provisions of this subtitle shall control.

(b) INTENT OF CONGRESS.—It is the intent of Congress to provide to each allottee benefits that are equivalent to, or exceed, the benefits the allottees possess on the day before the date of enactment of this Act, taking into consideration—

(1) the potential risks, cost, and time delay associated with litigation that would be resolved by the Compact and this subtitle;

(2) the availability of funding under this subtitle and from other sources;

(3) the availability of water from the Tribal water rights; and

(4) the applicability of section 7 of the Act of February 8, 1887 (25 U.S.C. 381), and this subtitle to protect the interests of allottees.

(c) TRUST STATUS OF TRIBAL WATER RIGHTS.—The Tribal water rights—

(1) shall be held in trust by the United States for the use and benefit of the Tribe and the allottees in accordance with this subtitle; and

(2) shall not be subject to forfeiture or abandonment.

(d) ALLOTTEES.—

(1) APPLICABILITY OF ACT OF FEBRUARY 8, 1887.—The provisions of section 7 of the Act of February 8, 1887 (25 U.S.C. 381), relating to the use of water for irrigation purposes, shall apply to the Tribal water rights.

(2) ENTITLEMENT TO WATER.—Any entitlement to water of an allottee under Federal law shall be satisfied from the Tribal water rights.

(3) ALLOCATIONS.—An allottee shall be entitled to a just and equitable allocation of water for irrigation purposes.

(4) CLAIMS.—

(A) EXHAUSTION OF REMEDIES.—Before asserting any claim against the United States under section 7 of the Act of February 8, 1887 (25 U.S.C. 381), or any other

applicable law, an allottee shall exhaust remedies available under the tribal water code or other applicable tribal law.

(B) ACTION FOR RELIEF.—After the exhaustion of all remedies available under the tribal water code or other applicable tribal law, an allottee may seek relief under section 7 of the Act of February 8, 1887 (25 U.S.C. 381), or other applicable law.

(5) AUTHORITY OF SECRETARY.—The Secretary shall have the authority to protect the rights of allottees in accordance with this section.

(e) AUTHORITY OF TRIBE.—

(1) IN GENERAL.—The Tribe shall have the authority to allocate, distribute, and lease the Tribal water rights for any use on the Reservation in accordance with the Compact, this subtitle, and applicable Federal law.

(2) OFF-RESERVATION USE.—The Tribe may allocate, distribute, and lease the Tribal water rights for off-Reservation use in accordance with the Compact, subject to the approval of the Secretary.

(3) LAND LEASES BY ALLOTTEES.—Notwithstanding paragraph (1), an allottee may lease any interest in land held by the allottee, together with any water right determined to be appurtenant to the interest in land, in accordance with the tribal water code.

(f) TRIBAL WATER CODE.—

(1) IN GENERAL.—Notwithstanding article IV.C.1. of the Compact, not later than 4 years after the date on which the Tribe ratifies the Compact in accordance with this subtitle, the Tribe shall enact a tribal water code that provides for—

(A) the management, regulation, and governance of all uses of the Tribal water rights in accordance with the Compact and this subtitle; and

(B) establishment by the Tribe of conditions, permit requirements, and other requirements for the allocation, distribution, or use of the Tribal water rights in accordance with the Compact and this subtitle.

(2) INCLUSIONS.—Subject to the approval of the Secretary, the tribal water code shall provide—

(A) that use of water by allottees shall be satisfied with water from the Tribal water rights;

(B) a process by which an allottee may request that the Tribe provide water for irrigation use in accordance with this subtitle, including the provision of water under any allottee lease under section 4 of the Act of June 25, 1910 (25 U.S.C. 403);

(C) a due process system for the consideration and determination by the Tribe of any request by an allottee (or a successor in interest to an allottee) for an allocation of water for irrigation purposes on allotted land, including a process for—

(i) appeal and adjudication of any denied or disputed distribution of water; and

(ii) resolution of any contested administrative decision; and

(D) a requirement that any allottee asserting a claim relating to the enforcement of rights of the allottee under the tribal water code, or to the quantity of water allocated

to land of the allottee, shall exhaust all remedies available to the allottee under tribal law before initiating an action against the United States or petitioning the Secretary pursuant to subsection (d)(4)(B).

(3) ACTION BY SECRETARY.—

(A) IN GENERAL.—During the period beginning on the date of enactment of this Act and ending on the date on which a tribal water code described in paragraphs (1) and (2) is enacted, the Secretary shall administer, with respect to the rights of allottees, the Tribal water rights in accordance with this subtitle.

(B) APPROVAL.—The tribal water code described in paragraphs (1) and (2) shall not be valid unless—

(i) the provisions of the tribal water code required by paragraph (2) are approved by the Secretary; and

(ii) each amendment to the tribal water code that affects a right of an allottee is approved by the Secretary.

(C) APPROVAL PERIOD.—

(i) IN GENERAL.—The Secretary shall approve or disapprove the tribal water code or an amendment to the tribal water code not later than 180 days after the date on which the tribal water code or amendment is submitted to the Secretary.

(ii) EXTENSION.—The deadline described in clause (i) may be extended by the Secretary after consultation with the Tribe.

(g) ADMINISTRATION.—

(1) NO ALIENATION.—The Tribe shall not permanently alienate any portion of the Tribal water rights.

(2) PURCHASES OR GRANTS OF LAND FROM INDIANS.—An authorization provided by this subtitle for the allocation, distribution, leasing, or other arrangement entered into pursuant to this subtitle shall be considered to satisfy any requirement for authorization of the action by treaty or convention imposed by section 2116 of the Revised Statutes (25 U.S.C. 177).

(3) PROHIBITION ON FORFEITURE.—The non-use of all or any portion of the Tribal water rights by a lessee or contractor shall not result in the forfeiture, abandonment, relinquishment, or other loss of all or any portion of the Tribal water rights.

(h) EFFECT.—Except as otherwise expressly provided in this section, nothing in this subtitle—

(1) authorizes any action by an allottee against any individual or entity, or against the Tribe, under Federal, State, tribal, or local law; or

(2) alters or affects the status of any action brought pursuant to section 1491(a) of title 28, United States Code.

SEC. 3716. BLACKFEET SETTLEMENT TRUST FUND.

(a) ESTABLISHMENT.—There is established in the Treasury of the United States a trust fund, to be known as the "Blackfeet Settlement Trust Fund" (referred to in this section as the "Trust Fund"), to be managed, invested, and distributed by the Secretary and to remain available until expended, consisting of the amounts deposited in the Trust Fund under subsection (c), together with any interest earned on those amounts, for the purpose of carrying out this subtitle.

(b) ACCOUNTS.—The Secretary shall establish in the Trust Fund the following accounts:

(1) The Administration and Energy Account.

(2) The OM&R Account.

(3) The St. Mary Account.

(4) The Blackfeet Water, Storage, and Development Projects Account.

(c) DEPOSITS.—The Secretary shall deposit in the Trust Fund—

(1) in the Administration and Energy Account, the amount made available pursuant to section 3718(a)(1)(A);

(2) in the OM&R Account, the amount made available pursuant to section 3718(a)(1)(B);

(3) in the St. Mary Account, the amount made available pursuant to section 3718(a)(1)(C); and

(4) in the Blackfeet Water, Storage, and Development Projects Account, the amount made available pursuant to section 3718(a)(1)(D).

(d) MANAGEMENT AND INTEREST.—

(1) MANAGEMENT.—The Secretary shall manage, invest, and distribute all amounts in the Trust Fund in a manner that is consistent with the investment authority of the Secretary under—

(A) the first section of the Act of June 24, 1938 (25 U.S.C. 162a);

(B) the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.); and

(C) this section.

(2) INTEREST.—In addition to the deposits under subsection (c), any interest credited to amounts unexpended in the Trust Fund are authorized to be appropriated to be used in accordance with the uses described in subsection (h).

(e) AVAILABILITY OF AMOUNTS.—

(1) IN GENERAL.—Amounts appropriated to, and deposited in, the Trust Fund, including any investment earnings, shall be made available to the Tribe by the Secretary beginning on the enforceability date.

(2) FUNDING FOR TRIBAL IMPLEMENTATION ACTIVITIES.—Notwithstanding paragraph (1), on approval pursuant to this subtitle and the Compact by a referendum vote of a majority of votes cast by members of the Tribe on the day of the vote, as certified by the Secretary and the Tribe and subject to the availability of appropriations, of the amounts in the Administration and Energy Account, $4,800,000 shall be made available to the Tribe for the implementation of this subtitle.

(f) WITHDRAWALS UNDER AIFRMRA.—

(1) IN GENERAL.—The Tribe may withdraw any portion of the funds in the Trust Fund on approval by the Secretary of a tribal management plan submitted by the Tribe in accordance with the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.).

(2) REQUIREMENTS.—

(A) IN GENERAL.—In addition to the requirements under the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.), the tribal management plan under paragraph (1) shall require that the Tribe shall spend all amounts withdrawn from the Trust Fund in accordance with this subtitle.

(B) ENFORCEMENT.—The Secretary may carry out such judicial and administrative actions as the Secretary determines to be necessary to enforce the tribal management plan to ensure that amounts withdrawn by the Tribe from the Trust Fund under this subsection are used in accordance with this subtitle.

(g) WITHDRAWALS UNDER EXPENDITURE PLAN.—

(1) IN GENERAL.—The Tribe may submit to the Secretary a request to withdraw funds from the Trust Fund pursuant to an approved expenditure plan.

(2) REQUIREMENTS.—To be eligible to withdraw funds under an expenditure plan under paragraph (1), the Tribe shall submit to the Secretary for approval an expenditure plan for any portion of the Trust Fund that the Tribe elects to withdraw pursuant to this subsection, subject to the condition that the funds shall be used for the purposes described in this subtitle.

(3) INCLUSIONS.—An expenditure plan under this subsection shall include a description of the manner and purpose for which the amounts proposed to be withdrawn from the Trust Fund will be used by the Tribe, in accordance with subsection (h).

(4) APPROVAL.—On receipt of an expenditure plan under this subsection, the Secretary shall approve the plan, if the Secretary determines that the plan—

(A) is reasonable; and

(B) is consistent with, and will be used for, the purposes of this subtitle.

(5) ENFORCEMENT.—The Secretary may carry out such judicial and administrative actions as the Secretary determines to be necessary to enforce an expenditure plan to ensure that amounts disbursed under this subsection are used in accordance with this subtitle.

(h) USES.—Amounts from the Trust Fund shall be used by the Tribe for the following purposes:

(1) The Administration and Energy Account shall be used for administration of the Tribal water rights and energy development projects under this subtitle and the Compact.

(2) The OM&R Account shall be used to assist the Tribe in paying OM&R costs.

(3) The St. Mary Account shall be distributed pursuant to an expenditure plan approved under subsection (g), subject to the conditions that—

(A) during the period for which the amount is available and held by the Secretary, $500,000 shall be distributed to the Tribe annually as compensation for the deferral of the St. Mary water right; and

(B) any additional amounts deposited in the account may be withdrawn and used by the Tribe to pay OM&R costs or other expenses for 1 or more projects to benefit the Tribe, as approved by the Secretary, subject to the requirement that the Secretary shall not approve an expenditure plan under this paragraph unless the Tribe provides a resolution of the tribal council—

(i) approving the withdrawal of the funds from the account; and

(ii) acknowledging that the Secretary will not be able to distribute funds under subparagraph (A) indefinitely if the principal funds in the account are reduced.

(4) The Blackfeet Water, Storage, and Development Projects Account shall be used to carry out section 3713.

(i) LIABILITY.—The Secretary and the Secretary of the Treasury shall not be liable for the expenditure or investment of any amounts withdrawn from the Trust Fund by the Tribe under subsection (f) or (g).

(j) NO PER CAPITA DISTRIBUTIONS.—No portion of the Trust Fund shall be distributed on a per capita basis to any member of the Tribe.

(k) DEPOSIT OF FUNDS.—On request by the Tribe, the Secretary may deposit amounts from an account described in paragraph (1), (2), or (4) of subsection (b) to any other account the Secretary determines to be appropriate.

SEC. 3717. BLACKFEET WATER SETTLEMENT IMPLEMENTATION FUND.

(a) ESTABLISHMENT.—There is established in the Treasury of the United States a nontrust, interest-bearing account, to be known as the "Blackfeet Water Settlement Implementation Fund" (referred to in this section as the "Implementation Fund"), to be managed and distributed by the Secretary, for use by the Secretary for carrying out this subtitle.

(b) ACCOUNTS.—The Secretary shall establish in the Implementation Fund the following accounts:

(1) The MR&I System, Irrigation, and Water Storage Account.

(2) The Blackfeet Irrigation Project Deferred Maintenance and Four Horns Dam Safety Improvements Account.

(3) The St. Mary/Milk Water Management and Activities Fund.

(c) DEPOSITS.—The Secretary shall deposit in the Implementation Fund—

(1) in the MR&I System, Irrigation, and Water Storage Account, the amount made available pursuant to section 3718(a)(2)(A);

(2) in the Blackfeet Irrigation Project Deferred Maintenance and Four Horns Dam Safety Improvements Account, the amount made available pursuant to section 3718(a)(2)(B); and

(3) in the St. Mary/Milk Water Management and Activities Fund, the amount made available pursuant to section 3718(a)(2)(C).

(d) USES.—

(1) MR&I SYSTEM, IRRIGATION, AND WATER STORAGE ACCOUNT.—The MR&I System, Irrigation, and Water Storage Account shall be used to carry out sections 3711 and 3712.

(2) BLACKFEET IRRIGATION PROJECT DEFERRED MAINTENANCE AND FOUR HORNS DAM SAFETY IMPROVEMENTS ACCOUNT.—The Blackfeet Irrigation Project Deferred Maintenance and Four Horns Dam Safety Improvements Account shall be used to carry out section 3710.

(3) ST. MARY/MILK WATER MANAGEMENT AND ACTIVITIES ACCOUNT.—The St. Mary/Milk Water Management and Activities Account shall be used to carry out sections 3705 and 3707.

(e) MANAGEMENT.—Amounts in the Implementation Fund shall not be available to the Secretary for expenditure until the enforceability date.

(f) INTEREST.—In addition to the deposits under subsection (c), any interest credited to amounts unexpended in the Implementation Fund are authorized to be appropriated to be used in accordance with the uses described in subsection (d).

SEC. 3718. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—Subject to subsection (b), there are authorized to be appropriated to the Secretary—

(1) as adjusted on appropriation to reflect changes since April 2010 in the Consumer Price Index for All Urban Consumers West Urban 50,000 to 1,500,000 index for the amount appropriated—

(A) for deposit in the Administration and Energy Account of the Blackfeet Settlement Trust Fund established under section 3716(b)(1), $28,900,000;

(B) for deposit in the OM&R Account of the Blackfeet Settlement Trust Fund established under section 3716(b)(2), $27,760,000;

(C) for deposit in the St. Mary Account of the Blackfeet Settlement Trust Fund established under section 3716(b)(3), $27,800,000;

(D) for deposit in the Blackfeet Water, Storage, and Development Projects Account of the Blackfeet Settlement Trust Fund established under section 3716(b)(4), $91,000,000; and

(E) the amount of interest credited to the unexpended amounts of the Blackfeet Settlement Trust Fund; and

(2) as adjusted annually to reflect changes since April 2010 in the Bureau of Reclamation Construction Cost Trends Index applicable to the types of construction involved—

(A) for deposit in the MR&I System, Irrigation, and Water Storage Account of the Blackfeet Water Settlement Implementation Fund established under section 3717(b)(1), $163,500,000;

(B) for deposit in the Blackfeet Irrigation Project Deferred Maintenance, Four Horns Dam Safety, and Rehabilitation and Enhancement of the Four Horns Feeder Canal, Dam, and Reservoir Improvements Account of the Blackfeet Water Settlement Implementation Fund established under section 3717(b)(2), $54,900,000, of which—

(i) $40,900,000 shall be made available for activities and projects under section 3710(c); and

(ii) $14,000,000 shall be made available for activities and projects under section 3710(d)(2);

(C) for deposit in the St. Mary/Milk Water Management and Activities Account of the Blackfeet Water Settlement Implementation Fund established under section 3717(b)(3), $28,100,000, of which—

(i) $27,600,000 shall be allocated in accordance with section 3707(g); and

(ii) $500,000 shall be used to carry out section 3705; and

(D) the amount of interest credited to the unexpended amounts of the Blackfeet Water Settlement Implementation Fund.

(b) ADJUSTMENTS.—

(1) IN GENERAL.—The adjustment of the amounts authorized to be appropriated pursuant to subsection (a)(1) shall occur each time an amount is appropriated for an account and shall add to, or subtract from, as applicable, the total amount authorized.

(2) REPETITION.—The adjustment process under this subsection shall be repeated for each subsequent amount appropriated until the amount authorized, as adjusted, has been appropriated.

(3) TREATMENT.—The amount of an adjustment may be considered—

(A) to be authorized as of the date on which congressional action occurs; and

(B) in determining the amount authorized to be appropriated.

SEC. 3719. WATER RIGHTS IN LEWIS AND CLARK NATIONAL FOREST AND GLACIER NATIONAL PARK.

The instream flow water rights of the Tribe on land within the Lewis and Clark National Forest and Glacier National Park—

(1) are confirmed; and

(2) shall be as described in the document entitled "Stipulation to Address Claims by and for the Benefit of the Blackfeet Indian Tribe to Water Rights in the Lewis & Clark National Forest and Glacier National Park" and as finally decreed by the Montana Water Court, or, if the Montana Water Court is found to lack jurisdiction, by the United States district court with jurisdiction.

SEC. 3720. WAIVERS AND RELEASES OF CLAIMS.

(a) IN GENERAL.—

(1) WAIVER AND RELEASE OF CLAIMS BY TRIBE AND UNITED STATES AS TRUSTEE FOR TRIBE.—Subject to the reservation of rights and retention of claims under subsection (c), as consideration for recognition of the Tribal water rights and other benefits as described in the Compact and this subtitle, the Tribe, acting on behalf of the Tribe and members of the Tribe (but not any member of the Tribe as an allottee), and the United States, acting as trustee for the Tribe and the members of the Tribe (but not any member of the Tribe as an allottee), shall execute a waiver and release of all claims for water rights within the State that the Tribe, or the United States acting as trustee for the Tribe, asserted or could have asserted in any proceeding, including a State stream adjudication, on or before the enforceability date, except to the extent that such rights are recognized in the Compact and this subtitle.

(2) WAIVER AND RELEASE OF CLAIMS BY UNITED STATES AS TRUSTEE FOR ALLOTTEES.—Subject to the reservation of rights and the retention of claims under subsection (c), as consideration for recognition of the Tribal water rights and other benefits as described in the Compact and this subtitle, the United States, acting as trustee for allottees, shall execute a waiver and release of all claims for water rights within the Reservation that the United States, acting as trustee for

the allottees, asserted or could have asserted in any proceeding, including a State stream adjudication, on or before the enforceability date, except to the extent that such rights are recognized in the Compact and this subtitle.

(3) WAIVER AND RELEASE OF CLAIMS BY TRIBE AGAINST UNITED STATES.—Subject to the reservation of rights and retention of claims under subsection (d), the Tribe, acting on behalf of the Tribe and members of the Tribe (but not any member of the Tribe as an allottee), shall execute a waiver and release of all claims against the United States (including any agency or employee of the United States)—

(A) relating to—

(i) water rights within the State that the United States, acting as trustee for the Tribe, asserted or could have asserted in any proceeding, including a stream adjudication in the State, except to the extent that such rights are recognized as Tribal water rights under this subtitle;

(ii) damage, loss, or injury to water, water rights, land, or natural resources due to loss of water or water rights (including damages, losses, or injuries to hunting, fishing, gathering, or cultural rights due to loss of water or water rights, claims relating to interference with, diversion, or taking of water, or claims relating to failure to protect, acquire, replace, or develop water, water rights, or water infrastructure) within the State that first accrued at any time on or before the enforceability date;

(iii) a failure to establish or provide a municipal rural or industrial water delivery system on the Reservation;

(iv) a failure to provide for operation or maintenance, or deferred maintenance, for the Blackfeet Irrigation Project or any other irrigation system or irrigation project on the Reservation;

(v) the litigation of claims relating to the water rights of the Tribe in the State; and

(vi) the negotiation, execution, or adoption of the Compact (including exhibits) or this subtitle;

(B) reserved in subsections (b) through (d) of section 3706 of the settlement for the case styled Blackfeet Tribe v. United States, No. 02–127L (Fed. Cl. 2012); and

(C) that first accrued at any time on or before the enforceability date—

(i) arising from the taking or acquisition of the land of the Tribe or resources for the construction of the features of the St. Mary Unit of the Milk River Project;

(ii) relating to the construction, operation, and maintenance of the St. Mary Unit of the Milk River Project, including Sherburne Dam, St. Mary Diversion Dam, St. Mary Canal and associated infrastructure, and the management of flows in Swiftcurrent Creek, including the diversion of Swiftcurrent Creek into Lower St. Mary Lake;

(iii) relating to the construction, operation, and management of Lower Two Medicine Dam and Reservoir and Four Horns Dam and Reservoir, including any claim relating to the failure to provide dam safety improvements for Four Horns Reservoir; or

(iv) relating to the allocation of waters of the Milk River and St. Mary River (including tributaries) between the United States and Canada pursuant to the International Boundary Waters Treaty of 1909 (36 Stat. 2448).

(b) EFFECTIVENESS.—The waivers and releases under subsection (a) shall take effect on the enforceability date.

(c) WITHDRAWAL OF OBJECTIONS.—The Tribe shall withdraw all objections to the water rights claims filed by the United States for the benefit of the Milk River Project, except objections to those claims consolidated for adjudication within Basin 40J, within 14 days of the certification under subsection (f)(5) that the Tribal membership has approved the Compact and this subtitle.

(1) Prior to withdrawal of the objections, the Tribe may seek leave of the Montana Water Court for a right to reinstate the objections in the event the conditions of enforceability in subsection (f)(1) through (8) are not satisfied by the date of expiration described in section 3723 of this subtitle.

(2) If the conditions of enforceability in subsection (f)(1) through (8) are satisfied, and any authority the Montana Water Court may have granted the Tribe to reinstate objections described in this section has not yet expired, the Tribe shall notify the Montana Water Court and the United States in writing that it will not exercise any such authority.

(d) RESERVATION OF RIGHTS AND RETENTION OF CLAIMS.—Notwithstanding the waivers and releases under subsection (a), the Tribe, acting on behalf of the Tribe and members of the Tribe, and the United States, acting as trustee for the Tribe and allottees, shall retain—

(1) all claims relating to—

(A) enforcement of, or claims accruing after the enforceability date relating to water rights recognized under, the Compact, any final decree, or this subtitle;

(B) activities affecting the quality of water, including any claim under—

(i) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.), including damages to natural resources;

(ii) the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) (commonly referred to as the "Clean Water Act"); and

(iv) any regulations implementing the Acts described in clauses (i) through (iii); or

(C) damage, loss, or injury to land or natural resources that are not due to loss of water or water rights (including hunting, fishing, gathering, or cultural rights);

(2) all rights to use and protect water rights acquired after the date of enactment of this Act; and

(3) all rights, remedies, privileges, immunities, and powers not specifically waived and released pursuant to this subtitle or the Compact.

(e) EFFECT OF COMPACT AND SUBTITLE.—Nothing in the Compact or this subtitle—

(1) affects the ability of the United States, acting as a sovereign, to take any action authorized by law (including any law relating to health, safety, or the environment), including—

(A) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(B) the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(C) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) (commonly referred to as the "Clean Water Act"); and

(D) any regulations implementing the Acts described in subparagraphs (A) through (C);

(2) affects the ability of the United States to act as trustee for any other Indian tribe or allottee of any other Indian tribe;

(3) confers jurisdiction on any State court—

(A) to interpret Federal law regarding health, safety, or the environment;

(B) to determine the duties of the United States or any other party pursuant to a Federal law regarding health, safety, or the environment; or

(C) to conduct judicial review of a Federal agency action;

(4) waives any claim of a member of the Tribe in an individual capacity that does not derive from a right of the Tribe;

(5) revives any claim waived by the Tribe in the case styled Blackfeet Tribe v. United States, No. 02–127L (Fed. Cl. 2012); or

(6) revives any claim released by an allottee or a tribal member in the settlement for the case styled Cobell v. Salazar, No. 1:96CV01285–JR (D.D.C. 2012).

(f) ENFORCEABILITY DATE.—The enforceability date shall be the date on which the Secretary publishes in the Federal Register a statement of findings that—

(1)(A) the Montana Water Court has approved the Compact, and that decision has become final and nonappealable; or

(B) if the Montana Water Court is found to lack jurisdiction, the appropriate United States district court has approved the Compact, and that decision has become final and nonappealable;

(2) all amounts authorized under section 3718(a) have been appropriated;

(3) the agreements required by sections 3706(c), 3707(f), and 3709(c) have been executed;

(4) the State has appropriated and paid into an interest-bearing escrow account any payments due as of the date of enactment of this Act to the Tribe under the Compact, the Birch Creek Agreement, and this subtitle;

(5) the members of the Tribe have voted to approve this subtitle and the Compact by a majority of votes cast on the day of the vote, as certified by the Secretary and the Tribe;

(6) the Secretary has fulfilled the requirements of section 3709(a);

(7) the agreement or terms and conditions referred to in section 3705 are executed and final; and

(8) the waivers and releases described in subsection (a) have been executed by the Tribe and the Secretary.

(g) TOLLING OF CLAIMS.—

(1) IN GENERAL.—Each applicable period of limitation and time-based equitable defense relating to a claim described in this section shall be tolled during the period beginning on the date of enactment of this Act and ending on the date on which the amounts made available to carry out this subtitle are transferred to the Secretary.

(2) EFFECT OF SUBSECTION.—Nothing in this subsection revives any claim or tolls any period of limitation or time-based equitable defense that expired before the date of enactment of this Act.

(h) EXPIRATION.—If all appropriations authorized by this subtitle have not been made available to the Secretary by January 21, 2026, or such alternative later date as is agreed to by the Tribe and the Secretary, the waivers and releases described in this section shall—

(1) expire; and

(2) have no further force or effect.

(i) VOIDING OF WAIVERS.—If the waivers and releases described in this section are void under subsection (h)—

(1) the approval of the United States of the Compact under section 3704 shall no longer be effective;

(2) any unexpended Federal funds appropriated or made available to carry out the activities authorized by this subtitle, together with any interest earned on those funds, and any water rights or contracts to use water and title to other property acquired or constructed with Federal funds appropriated or made available to carry out the activities authorized under this subtitle shall be returned to the Federal Government, unless otherwise agreed to by the Tribe and the United States and approved by Congress; and

(3) except for Federal funds used to acquire or develop property that is returned to the Federal Government under paragraph (2), the United States shall be entitled to offset any Federal funds appropriated or made available to carry out the activities authorized under this subtitle that were expended or withdrawn, together with any interest accrued, against any claims against the United States relating to water rights in the State asserted by the Tribe or any user of the Tribal water rights or in any future settlement of the water rights of the Tribe or an allottee.

SEC. 3721. SATISFACTION OF CLAIMS.

(a) TRIBAL CLAIMS.—The benefits realized by the Tribe under this subtitle shall be in complete replacement of, complete substitution for, and full satisfaction of all—

(1) claims of the Tribe against the United States waived and released pursuant to section 3720(a); and

(2) objections withdrawn pursuant to section 3720(c).

(b) ALLOTTEE CLAIMS.—The benefits realized by the allottees under this subtitle shall be in complete replacement of, complete substitution for, and full satisfaction of—

(1) all claims waived and released pursuant to section 3720(a)(2); and

(2) any claim of an allottee against the United States similar in nature to a claim described in section 3720(a)(2) that the allottee asserted or could have asserted.

SEC. 3722. MISCELLANEOUS PROVISIONS.

(a) WAIVER OF SOVEREIGN IMMUNITY.—Except as provided in subsections (a) through (c) of section 208 of the Department of Justice Appropriation Act, 1953 (43 U.S.C. 666), nothing in this subtitle waives the sovereign immunity of the United States.

(b) OTHER TRIBES NOT ADVERSELY AFFECTED.—Nothing in this subtitle quantifies or diminishes any land or water right, or any claim or entitlement to land or water, of an Indian tribe, band, or community other than the Tribe.

(c) LIMITATION ON CLAIMS FOR REIMBURSEMENT.—With respect to any Indian-owned land located within the Reservation—

(1) the United States shall not submit against that land any claim for reimbursement of the cost to the United States of carrying out this subtitle or the Compact; and

(2) no assessment of that land shall be made regarding that cost.

(d) LIMITATION ON LIABILITY OF UNITED STATES.—

(1) IN GENERAL.—The United States has no obligation—

(A) to monitor, administer, or account for, in any manner, any funds provided to the Tribe by the State; or

(B) to review or approve any expenditure of those funds.

(2) INDEMNITY.—The Tribe shall indemnify the United States, and hold the United States harmless, with respect to all claims (including claims for takings or breach of trust) arising from the receipt or expenditure of amounts described in this subsection.

(e) EFFECT ON CURRENT LAW.—Nothing in this section affects any provision of law (including regulations) in effect on the day before the date of enactment of this Act with respect to preenforcement review of any Federal environmental enforcement action.

(f) EFFECT ON RECLAMATION LAWS.—The activities carried out by the Commissioner of Reclamation under this subtitle shall not establish a precedent or impact the authority provided under any other provision of the reclamation laws, including—

(1) the Reclamation Rural Water Supply Act of 2006 (43 U.S.C. 2401 et seq.); and

(2) the Omnibus Public Land Management Act of 2009 (Public Law 111–11; 123 Stat. 991).

(g) IRRIGATION EFFICIENCY IN UPPER BIRCH CREEK DRAINAGE.—Any activity carried out by the Tribe in the Upper Birch Creek Drainage (as defined in article II.50 of the Compact) using funds made available to carry out this subtitle shall achieve an irrigation efficiency of not less than 50 percent.

(h) BIRCH CREEK AGREEMENT APPROVAL.—The Birch Creek Agreement is approved to the extent that the Birch Creek Agreement requires approval under section 2116 of the Revised Statutes (25 U.S.C. 177).

(i) LIMITATION ON EFFECT.—Nothing in this subtitle or the Compact—

(1) makes an allocation or apportionment of water between or among States; or

(2) addresses or implies whether, how, or to what extent the Tribal water rights, or any portion of the Tribal water rights, should be accounted for as part of, or otherwise charged against, an allocation or apportionment of water made to a State in an interstate allocation or apportionment.

SEC. 3723. EXPIRATION ON FAILURE TO MEET ENFORCEABILITY DATE.

If the Secretary fails to publish a statement of findings under section 3720(f) by not later than January 21, 2025, or such alternative later date as is agreed to by the Tribe and the Secretary, after reasonable notice to the State, as applicable—

(1) this subtitle expires effective on the later of—

(A) January 22, 2025; and

(B) the day after such alternative later date as is agreed to by the Tribe and the Secretary;

(2) any action taken by the Secretary and any contract or agreement entered into pursuant to this subtitle shall be void;

(3) any amounts made available under section 3718, together with any interest on those amounts, that remain unexpended shall immediately revert to the general fund of the Treasury, except for any funds made available under section 3716(e)(2) if the Montana Water Court denies the Tribe's request to reinstate the objections in section 3720(c); and

(4) the United States shall be entitled to offset against any claims asserted by the Tribe against the United States relating to water rights—

(A) any funds expended or withdrawn from the amounts made available pursuant to this subtitle; and

(B) any funds made available to carry out the activities authorized by this subtitle from other authorized sources, except for any funds provided under section 3716(e)(2) if the Montana Water court denies the Tribe's request to reinstate the objections in section 3720(c).

SEC. 3724. ANTIDEFICIENCY.

The United States shall not be liable for any failure to carry out any obligation or activity authorized by this subtitle (including any obligation or activity under the Compact) if—

(1) adequate appropriations are not provided expressly by Congress to carry out the purposes of this subtitle; or

(2) there are not enough monies available to carry out the purposes of this subtitle in the Reclamation Water Settlements Fund established under section 10501(a) of the Omnibus Public Land Management Act of 2009 (43 U.S.C. 407(a)).

Subtitle H—Water Desalination

SEC. 3801. REAUTHORIZATION OF WATER DESALINATION ACT OF 1996.

(a) AUTHORIZATION OF RESEARCH AND STUDIES.—Section 3 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298) is amended—

(1) in subsection (a)—

(A) in paragraph (6), by striking "and" at the end;

(B) in paragraph (7), by striking the period at the end and inserting a semicolon; and

(C) by adding at the end the following:

"(8) development of metrics to analyze the costs and benefits of desalination relative to other sources of water (including costs and benefits related to associated infrastructure, energy use, environmental impacts, and diversification of water supplies); and

"(9) development of design and siting specifications that avoid or minimize, adverse economic and environmental impacts."; and

(2) by adding at the end the following:

"(e) PRIORITIZATION.—In carrying out this section, the Secretary shall prioritize funding for research—

"(1) to reduce energy consumption and lower the cost of desalination, including chloride control;

"(2) to reduce the environmental impacts of seawater desalination and develop technology and strategies to minimize those impacts;

"(3) to improve existing reverse osmosis and membrane technology;

"(4) to carry out basic and applied research on next generation desalination technologies, including improved energy recovery systems and renewable energy-powered desalination systems that could significantly reduce desalination costs;

"(5) to develop portable or modular desalination units capable of providing temporary emergency water supplies for domestic or military deployment purposes; and

"(6) to develop and promote innovative desalination technologies, including chloride control, identified by the Secretary.".

(b) DESALINATION DEMONSTRATION AND DEVELOPMENT.—Section 4 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298) is amended by adding at the end the following:

"(c) PRIORITIZATION.—In carrying out demonstration and development activities under this section, the Secretary shall prioritize projects—

"(1) for the benefit of drought-stricken States and communities;

"(2) for the benefit of States that have authorized funding for research and development of desalination technologies and projects;

"(3) that can reduce reliance on imported water supplies that have an impact on species listed under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); and

"(4) that demonstrably leverage the experience of international partners with considerable expertise in desalination, such as the State of Israel.

"(d) WATER PRODUCTION.—The Secretary shall provide, as part of the annual budget submission to Congress, an estimate of how much water has been produced and delivered in the past fiscal year using processes and facilities developed or demonstrated using assistance provided under sections 3 and 4. This submission shall include, to the extent practicable, available information on a detailed water accounting by process and facility and the cost per acre foot of water produced and delivered.".

(c) AUTHORIZATION OF APPROPRIATIONS.—Section 8 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298) is amended—

(1) in subsection (a), by striking "2013" and inserting "2021"; and

(2) in subsection (b), by striking "for each of fiscal years 2012 through 2013" and inserting "for each of fiscal years 2017 through 2021".

(d) CONSULTATION.—Section 9 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298) is amended—

(1) by striking the section designation and heading and all that follows through "In carrying out" in the first sentence and inserting the following:

"SEC. 9. CONSULTATION AND COORDINATION.

"(a) CONSULTATION.—In carrying out";

(2) in the second sentence, by striking "The authorization" and inserting the following:

"(c) OTHER DESALINATION PROGRAMS.—The authorization"; and

(3) by inserting after subsection (a) (as designated by paragraph (1)) the following:

"(b) COORDINATION OF FEDERAL DESALINATION RESEARCH AND DEVELOPMENT.—The White House Office of Science and Technology Policy shall develop a coordinated strategic plan that—

"(1) establishes priorities for future Federal investments in desalination;

"(2) coordinates the activities of Federal agencies involved in desalination, including the Bureau of Reclamation, the Corps of Engineers, the United States Army Tank Automotive Research, Development and Engineering Center, the National Science Foundation, the Office of Naval Research of the Department of Defense, the National Laboratories of the Department of Energy, the United States Geological Survey, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration;

"(3) strengthens research and development cooperation with international partners, such as the State of Israel, in the area of desalination technology; and

"(4) promotes public-private partnerships to develop a framework for assessing needs for, and to optimize siting and design of, future ocean desalination projects.".

Subtitle I—Amendments to the Great Lakes Fish and Wildlife Restoration Act of 1990

SEC. 3901. AMENDMENTS TO THE GREAT LAKES FISH AND WILDLIFE RESTORATION ACT OF 1990.

(a) REFERENCES.—Except as otherwise expressly provided, wherever in this section an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Great Lakes Fish and Wildlife Restoration Act of 1990 (16 U.S.C. 941 et seq.).

(b) FINDINGS.—The Act is amended by striking section 1002 and inserting the following:

16 USC 941.

"SEC. 1002. FINDINGS.

"Congress finds that—

"(1) the Great Lakes have fish and wildlife communities that are structurally and functionally changing;

"(2) successful fish and wildlife management focuses on the lakes as ecosystems, and effective management requires the coordination and integration of efforts of many partners;

"(3) additional actions and better coordination are needed to protect and effectively manage the fish and wildlife resources, and the habitats on which the resources depend, in the Great Lakes Basin; and

"(4) this Act allows Federal agencies, States, and Indian tribes to work in an effective partnership by providing the funding for restoration work.".

(c) IDENTIFICATION, REVIEW, AND IMPLEMENTATION OF PROPOSALS AND REGIONAL PROJECTS.—

(1) REQUIREMENTS FOR PROPOSALS AND REGIONAL PROJECTS.—Section 1005(b)(2)(B) (16 U.S.C. 941c(b)(2)(B)) is amended—

(A) in clause (v), by striking "and" at the end;

(B) in clause (vi), by striking the period at the end and inserting a semicolon; and

(C) by adding at the end the following:

"(vii) the strategic action plan of the Great Lakes Restoration Initiative; and

"(viii) each applicable State wildlife action plan.".

(2) REVIEW OF PROPOSALS.—Section 1005(c)(2)(C) (16 U.S.C. 941c(c)(2)(C)) is amended by striking "Great Lakes Coordinator of the".

(3) COST SHARING.—Section 1005(e) (16 U.S.C. 941c(e)) is amended—

(A) in paragraph (1)—

(i) by striking "Except as provided in paragraphs (2) and (4), not less than 25 percent of the cost of implementing a proposal" and inserting the following:

"(A) NON-FEDERAL SHARE.—Except as provided in paragraphs (3) and (5) and subject to paragraph (2), not less than 25 percent of the cost of implementing a proposal or regional project"; and

(ii) by adding at the end the following:

"(B) TIME PERIOD FOR PROVIDING MATCH.—The non-Federal share of the cost of implementing a proposal or regional project required under subparagraph (A) may be provided at any time during the 2-year period preceding January 1 of the year in which the Director receives the application for the proposal or regional project.";

(B) by redesignating paragraphs (2) through (4) as paragraphs (3) through (5), respectively; and

(C) by inserting before paragraph (3) (as so redesignated) the following:

"(2) AUTHORIZED SOURCES OF NON-FEDERAL SHARE.—

"(A) IN GENERAL.—The Director may determine the non-Federal share under paragraph (1) by taking into account—

"(i) the appraised value of land or a conservation easement as described in subparagraph (B); or

"(ii) as described in subparagraph (C), the costs associated with—

"(I) securing a conservation easement; and

"(II) restoration or enhancement of the conservation easement.

"(B) APPRAISAL OF CONSERVATION EASEMENT.—

"(i) IN GENERAL.—The value of a conservation easement may be used to satisfy the non-Federal share of the cost of implementing a proposal or regional project required under paragraph (1)(A) if the Director determines that the conservation easement—

"(I) meets the requirements of subsection (b)(2);

"(II) is acquired before the end of the grant period of the proposal or regional project;

"(III) is held in perpetuity for the conservation purposes of the programs of the United States Fish and Wildlife Service related to the Great Lakes Basin, as described in section 1006, by an accredited land trust or conservancy or a Federal, State, or tribal agency;

"(IV) is connected either physically or through a conservation planning process to the proposal or regional project; and

"(V) is appraised in accordance with clause (ii).

"(ii) APPRAISAL.—With respect to the appraisal of a conservation easement described in clause (i)—

"(I) the appraisal valuation date shall be not later than 1 year after the price of the conservation easement was set under a contract; and

"(II) the appraisal shall—

"(aa) conform to the Uniform Standards of Professional Appraisal Practice (USPAP); and

"(bb) be completed by a Federal- or State-certified appraiser.

"(C) COSTS OF SECURING CONSERVATION EASEMENTS.—

"(i) IN GENERAL.—All costs associated with securing a conservation easement and restoration or enhancement of that conservation easement may be

used to satisfy the non-Federal share of the cost of implementing a proposal or regional project required under paragraph (1)(A) if the activities and expenses associated with securing the conservation easement and restoration or enhancement of that conservation easement meet the requirements of subparagraph (B)(i).

"(ii) INCLUSION.—The costs referred to in clause (i) may include cash, in-kind contributions, and indirect costs.

"(iii) EXCLUSION.—The costs referred to in clause (i) may not be costs associated with mitigation or litigation (other than costs associated with the Natural Resource Damage Assessment program).".

(d) ESTABLISHMENT OF OFFICES.—Section 1007 (16 U.S.C. 941e) is amended—

(1) in subsection (b)—

(A) in the subsection heading, by striking "FISHERY RESOURCES" and inserting "FISH AND WILDLIFE CONSERVATION"; and

(B) by striking "Fishery Resources" each place it appears and inserting "Fish and Wildlife Conservation";

(2) in subsection (c)—

(A) in the subsection heading, by striking "FISHERY RESOURCES" and inserting "FISH AND WILDLIFE CONSERVATION"; and

(B) by striking "Fishery Resources" each place it appears and inserting "Fish and Wildlife Conservation";

(3) by striking subsection (a); and

(4) by redesignating subsections (b) and (c) as subsections (a) and (b), respectively.

(e) REPORTS.—Section 1008 (16 U.S.C. 941f) is amended—

(1) in subsection (a), in the matter preceding paragraph (1), by striking "2011" and inserting "2021";

(2) in subsection (b)—

(A) in the matter preceding paragraph (1), by striking "2007 through 2012" and inserting "2016 through 2020"; and

(B) in paragraph (5), by inserting "the Great Lakes Restoration Initiative Action Plan based on" after "in support of"; and

(3) by striking subsection (c) and inserting the following:

"(c) CONTINUED MONITORING AND ASSESSMENT OF STUDY FINDINGS AND RECOMMENDATIONS.—The Director—

"(1) shall continue to monitor the status, and the assessment, management, and restoration needs, of the fish and wildlife resources of the Great Lakes Basin; and

"(2) may reassess and update, as necessary, the findings and recommendations of the Report.".

(f) AUTHORIZATION OF APPROPRIATIONS.—Section 1009 (16 U.S.C. 941g) is amended—

(1) in the matter preceding paragraph (1), by striking "2007 through 2012" and inserting "2016 through 2021";

(2) in paragraph (1)—

(A) in the matter preceding subparagraph (A), by striking "$14,000,000" and inserting "$6,000,000";

(B) in subparagraph (A), by striking "$4,600,000" and inserting "$2,000,000"; and

(C) in subparagraph (B), by striking "$700,000" and inserting "$300,000"; and

(3) in paragraph (2), by striking "the activities of" and all that follows through "section 1007" and inserting "the activities of the Upper Great Lakes Fish and Wildlife Conservation Offices and the Lower Great Lakes Fish and Wildlife Conservation Office under section 1007".

(g) PROHIBITION ON USE OF FUNDS FOR FEDERAL ACQUISITION OF INTERESTS IN LAND.—Section 1009 (16 U.S.C. 941g) is further amended—

(1) by inserting before the sentence the following:

"(a) AUTHORIZATION.—"; and

(2) by adding at the end the following:

"(b) PROHIBITION ON USE OF FUNDS FOR FEDERAL ACQUISITION OF INTERESTS IN LAND.—No funds appropriated or used to carry out this Act may be used for acquisition by the Federal Government of any interest in land.".

(h) CONFORMING AMENDMENT.—Section 8 of the Great Lakes Fish and Wildlife Restoration Act of 2006 (16 U.S.C. 941 note; Public Law 109–326) is repealed.

Subtitle J—California Water

SEC. 4001. OPERATIONS AND REVIEWS.

(a) WATER SUPPLIES.—The Secretary of the Interior and Secretary of Commerce shall provide the maximum quantity of water supplies practicable to Central Valley Project agricultural, municipal and industrial contractors, water service or repayment contractors, water rights settlement contractors, exchange contractors, refuge contractors, and State Water Project contractors, by approving, in accordance with applicable Federal and State laws (including regulations), operations or temporary projects to provide additional water supplies as quickly as possible, based on available information.

(b) ADMINISTRATION.—In carrying out subsection (a), the Secretary of the Interior and Secretary of Commerce shall, consistent with applicable laws (including regulations)—

(1)(A) in close coordination with the California Department of Water Resources and the California Department of Fish and Wildlife, implement a pilot project to test and evaluate the ability to operate the Delta cross-channel gates daily or as otherwise may be appropriate to keep them open to the greatest extent practicable to protect out-migrating salmonids, manage salinities in the interior Delta and any other water quality issues, and maximize Central Valley Project and State Water Project pumping, subject to the condition that the pilot project shall be designed and implemented consistent with operational criteria and monitoring criteria required by the California State Water Resources Control Board; and

(B) design, implement, and evaluate such real-time monitoring capabilities to enable effective real-time operations of the cross channel in order efficiently to meet the objectives described in subparagraph (A);

(2) with respect to the operation of the Delta cross-channel gates described in paragraph (1), collect data on the impact of that operation on—

(A) species listed as threatened or endangered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(B) water quality; and

(C) water supply benefits;

(3) collaborate with the California Department of Water Resources to install a deflection barrier at Georgiana Slough and the Delta Cross Channel Gate to protect migrating salmonids, consistent with knowledge gained from activities carried out during 2014 and 2015;

(4) upon completion of the pilot project in paragraph (1), submit to the Senate Committees on Energy and Natural Resources and Environment and Public Works and the House Committee on Natural Resources a written notice and explanation on the extent to which the gates are able to remain open and the pilot project achieves all the goals set forth in paragraphs (1) through (3);

(5) implement turbidity control strategies that may allow for increased water deliveries while avoiding jeopardy to adult Delta smelt (Hypomesus transpacificus);

(6) in a timely manner, evaluate any proposal to increase flow in the San Joaquin River through a voluntary sale, transfer, or exchange of water from an agency with rights to divert water from the San Joaquin River or its tributaries;

(7) adopt a 1:1 inflow to export ratio for the increment of increased flow, as measured as a 3-day running average at Vernalis during the period from April 1 through May 31, that results from the voluntary sale, transfer, or exchange, unless the Secretary of the Interior and Secretary of Commerce determine in writing that a 1:1 inflow to export ratio for that increment of increased flow will cause additional adverse effects on listed salmonid species beyond the range of the effects anticipated to occur to the listed salmonid species for the duration of the salmonid biological opinion using the best scientific and commercial data available; and subject to the condition that any individual sale, transfer, or exchange using a 1:1 inflow to export ratio adopted under the authority of this section may only proceed if—

(A) the Secretary of the Interior determines that the environmental effects of the proposed sale, transfer, or exchange are consistent with effects permitted under applicable law (including the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1381 et seq.), and the Porter-Cologne Water Quality Control Act (California Water Code 13000 et seq.));

(B) Delta conditions are suitable to allow movement of the acquired, transferred, or exchanged water through the Delta consistent with existing Central Valley Project and State Water Project permitted water rights and the requirements of subsection (a)(1)(H) of the Central Valley Project Improvement Act; and

(C) such voluntary sale, transfer, or exchange of water results in flow that is in addition to flow that otherwise

would occur in the absence of the voluntary sale, transfer, or exchange;

(8)(A) issue all necessary permit decisions during emergency consultation under the authority of the Secretary of the Interior and Secretary of Commerce not later than 60 days after receiving a completed application by the State to place and use temporary barriers or operable gates in Delta channels to improve water quantity and quality for State Water Project and Central Valley Project south-of-Delta water contractors and other water users, which barriers or gates shall provide benefits for species protection and in-Delta water user water quality, provided that they are designed so that, if practicable, formal consultations under section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) are not necessary; and

(B) take longer to issue the permit decisions in subparagraph (A) only if the Secretary determines in writing that an Environmental Impact Statement is needed for the proposal to comply with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

(9) allow and facilitate, consistent with existing priorities, water transfers through the C.W. "Bill" Jones Pumping Plant or the Harvey O. Banks Pumping Plant from April 1 to November 30;

(10) require the Director of the United States Fish and Wildlife Service and the Commissioner of Reclamation to—

(A) determine if a written transfer proposal is complete within 30 days after the date of submission of the proposal. If the contracting district or agency or the Secretary determines that the proposal is incomplete, the district or agency or the Secretary shall state with specificity what must be added to or revised for the proposal to be complete;

(B) complete all requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and the Endangered Species Act of 1973 (16 U.S.C. et seq.) necessary to make final permit decisions on water transfer requests in the State, not later than 45 days after receiving a completed request;

(C) take longer to issue the permit decisions in subparagraph (B) only if the Secretary determines in writing that an Environmental Impact Statement is needed for the proposal to comply with the National Environmental Policy Act of 1969 (42 U.S.C. et seq.), or that the application is incomplete pursuant to subparagraph (A); and

(D) approve any water transfer request described in subparagraph (A) to maximize the quantity of water supplies on the condition that actions associated with the water transfer are consistent with—

(i) existing Central Valley Project and State Water Project permitted water rights and the requirements of section 3405(a)(1)(H) of the Central Valley Project Improvement Act; and

(ii) all other applicable laws and regulations;

(11) in coordination with the Secretary of Agriculture, enter into an agreement with the National Academy of Sciences to conduct a comprehensive study, to be completed not later than 1 year after the date of enactment of this subtitle, on the effectiveness and environmental impacts of salt cedar biological

control efforts on increasing water supplies and improving riparian habitats of the Colorado River and its principal tributaries, in the State of California and elsewhere;

(12) pursuant to the research and adaptive management procedures of the smelt biological opinion and the salmonid biological opinion use all available scientific tools to identify any changes to the real-time operations of Bureau of Reclamation, State, and local water projects that could result in the availability of additional water supplies; and

(13) determine whether alternative operational or other management measures would meet applicable regulatory requirements for listed species while maximizing water supplies and water supply reliability; and

(14) continue to vary the averaging period of the Delta Export/Inflow ratio, to the extent consistent with any applicable State Water Resources Control Board orders under decision D–1641, to operate to a

(A) ratio using a 3-day averaging period on the rising limb of a Delta inflow hydrograph; and

(B) 14-day averaging period on the falling limb of the Delta inflow hydrograph.

(c) OTHER AGENCIES.—To the extent that a Federal agency other than the Department of the Interior and the Department of Commerce has a role in approving projects described in subsections (a) and (b), this section shall apply to the Federal agency.

(d) ACCELERATED PROJECT DECISION AND ELEVATION.—

(1) IN GENERAL.—On request of the Governor of California, the Secretary of the Interior and Secretary of Commerce shall use the expedited procedures under this subsection to make final decisions relating to Federal or federally approved projects or operational changes proposed pursuant to subsections (a) and (b) to provide additional water supplies or otherwise address emergency drought conditions.

(2) REQUEST FOR RESOLUTION.—Not later than 7 days after receiving a request of the Governor of California, the Secretaries referred to in paragraph (1), or the head of another Federal agency responsible for carrying out a review of a project, as applicable, the Secretary of the Interior shall convene a final project decision meeting with the heads of all relevant Federal agencies to decide whether to approve a project to provide emergency water supplies or otherwise address emergency drought condition.

(3) NOTIFICATION.—Upon receipt of a request for a meeting under this subsection, the Secretary of the Interior shall notify the heads of all relevant Federal agencies of the request, including a description of the project to be reviewed and the date for the meeting.

(4) DECISION.—Not later than 10 days after the date on which a meeting is requested under paragraph (2), the head of the relevant Federal agency shall issue a final decision on the project.

(2) MEETING CONVENED BY SECRETARY.—The Secretary of the Interior may convene a final project decision meeting under this subsection at any time, at the discretion of the Secretary, regardless of whether a meeting is requested under paragraph (2).

(3) LIMITATION.—The expedited procedures under this subsection apply only to—

(A) proposed new Federal projects or operational changes pursuant to subsection (a) or (b); and

(B) the extent they are consistent with applicable laws (including regulations).

(e) OPERATIONS PLAN.—The Secretaries of Commerce and the Interior, in consultation with appropriate State officials, shall develop an operations plan that is consistent with the provisions of this subtitle and other applicable Federal and State laws, including provisions that are intended to provide additional water supplies that could be of assistance during the current drought.

SEC. 4002. SCIENTIFICALLY SUPPORTED IMPLEMENTATION OF OMR FLOW REQUIREMENTS.

(a) IN GENERAL.—In implementing the provisions of the smelt biological opinion and the salmonid biological opinion, the Secretary of the Interior and the Secretary of Commerce shall manage reverse flow in Old and Middle Rivers at the most negative reverse flow rate allowed under the applicable biological opinion to maximize water supplies for the Central Valley Project and the State Water Project, unless that management of reverse flow in Old and Middle Rivers to maximize water supplies would cause additional adverse effects on the listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the applicable biological opinion, or would be inconsistent with applicable State law requirements, including water quality, salinity control, and compliance with State Water Resources Control Board Order D–1641 or a successor order.

(b) REQUIREMENTS.—If the Secretary of the Interior or Secretary of Commerce determines to manage rates of pumping at the C.W. "Bill" Jones and the Harvey O. Banks pumping plants in the southern Delta to achieve a reverse OMR flow rate less negative than the most negative reverse flow rate prescribed by the applicable biological opinion, the Secretary shall—

(1) document in writing any significant facts regarding real-time conditions relevant to the determinations of OMR reverse flow rates, including—

(A) targeted real-time fish monitoring in the Old River pursuant to this section, including as it pertains to the smelt biological opinion monitoring of Delta smelt in the vicinity of Station 902;

(B) near-term forecasts with available salvage models under prevailing conditions of the effects on the listed species of OMR flow at the most negative reverse flow rate prescribed by the biological opinion; and

(C) any requirements under applicable State law; and

(2) explain in writing why any decision to manage OMR reverse flow at rates less negative than the most negative reverse flow rate prescribed by the biological opinion is necessary to avoid additional adverse effects on the listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the applicable biological opinion, after considering relevant factors such as—

(A) the distribution of the listed species throughout the Delta;

(B) the potential effects of high entrainment risk on subsequent species abundance;

(C) the water temperature;

(D) other significant factors relevant to the determination, as required by applicable Federal or State laws;

(E) turbidity; and

(F) whether any alternative measures could have a substantially lesser water supply impact.

(c) LEVEL OF DETAIL REQUIRED.—The analyses and documentation required by this section shall be comparable to the depth and complexity as is appropriate for real time decision-making. This section shall not be interpreted to require a level of administrative findings and documentation that could impede the execution of effective real time adaptive management.

(d) FIRST SEDIMENT FLUSH.—During the first flush of sediment out of the Delta in each water year, and provided that such determination is based upon objective evidence, notwithstanding subsection (a), the Secretary of the Interior shall manage OMR flow pursuant to the provisions of the smelt biological opinion that protects adult Delta smelt from the first flush if required to do so by the smelt biological opinion.

(e) CONSTRUCTION.—The Secretary of the Interior and the Secretary of Commerce are authorized to implement subsection (a) consistent with the results of monitoring through Early Warning Surveys to make real time operational decisions consistent with the current applicable biological opinion.

(f) CALCULATION OF REVERSE FLOW IN OMR.—Within 180 days of the enactment of this subtitle, the Secretary of the Interior is directed, in consultation with the California Department of Water Resources, and consistent with the smelt biological opinion and the salmonid biological opinion, to review, modify, and implement, if appropriate, the method used to calculate reverse flow in Old and Middle Rivers, for implementation of the reasonable and prudent alternatives in the smelt biological opinion and the salmonid biological opinion, and any succeeding biological opinions.

SEC. 4003. TEMPORARY OPERATIONAL FLEXIBILITY FOR STORM EVENTS.

(a) IN GENERAL.—

(1) Nothing in this subtitle authorizes additional adverse effects on listed species beyond the range of the effects anticipated to occur to the listed species for the duration of the smelt biological opinion or salmonid biological opinion, using the best scientific and commercial data available.

(2) When consistent with the environmental protection mandate in paragraph (1) while maximizing water supplies for Central Valley Project and State Water Project contractors, the Secretary of the Interior and the Secretary of Commerce, through an operations plan, shall evaluate and may authorize the Central Valley Project and the State Water Project, combined, to operate at levels that result in OMR flows more negative than the most negative reverse flow rate prescribed by the applicable biological opinion (based on United States Geological Survey gauges on Old and Middle Rivers) daily average as described in subsections (b) and (c) to capture peak flows during storm-related events.

(b) FACTORS TO BE CONSIDERED.—In determining additional adverse effects on any listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the smelt biological opinion or salmonid biological opinion, using the best scientific and commercial data available, the Secretaries of the Interior and Commerce may consider factors including:

(1) The degree to which the Delta outflow index indicates a higher level of flow available for diversion.

(2) Relevant physical parameters including projected inflows, turbidity, salinities, and tidal cycles.

(3) The real-time distribution of listed species.

(c) OTHER ENVIRONMENTAL PROTECTIONS.—

(1) STATE LAW.—The actions of the Secretary of the Interior and the Secretary of Commerce under this section shall be consistent with applicable regulatory requirements under State law.

(2) FIRST SEDIMENT FLUSH.—During the first flush of sediment out of the Delta in each water year, and provided that such determination is based upon objective evidence, the Secretary of the Interior shall manage OMR flow pursuant to the portion of the smelt biological opinion that protects adult Delta smelt from the first flush if required to do so by the smelt biological opinion.

(3) APPLICABILITY OF OPINION.—This section shall not affect the application of the salmonid biological opinion from April 1 to May 31, unless the Secretary of Commerce finds that some or all of such applicable requirements may be adjusted during this time period to provide emergency water supply relief without resulting in additional adverse effects on listed salmonid species beyond the range of the effects anticipated to occur to the listed salmonid species for the duration of the salmonid biological opinion using the best scientific and commercial data available. In addition to any other actions to benefit water supply, the Secretary of the Interior and the Secretary of Commerce shall consider allowing through-Delta water transfers to occur during this period if they can be accomplished consistent with section 3405(a)(1)(H) of the Central Valley Project Improvement Act and other applicable law. Water transfers solely or exclusively through the State Water Project are not required to be consistent with subsection (a)(1)(H) of the Central Valley Project Improvement Act.

(4) MONITORING.—During operations under this section, the Commissioner of Reclamation, in coordination with the Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Wildlife, shall undertake expanded monitoring programs and other data gathering to improve the efficiency of operations for listed species protections and Central Valley Project and State Water Project water supply to ensure incidental take levels are not exceeded, and to identify potential negative impacts, if any.

(d) EFFECT OF HIGH OUTFLOWS.—When exercising their authorities to capture peak flows pursuant to subsection (c), the Secretary of the Interior and the Secretary of Commerce shall not count such days toward the 5-day and 14-day running averages of tidally filtered daily Old and Middle River flow requirements under the smelt biological opinion and salmonid biological opinion, unless doing so is required to avoid additional adverse effects on

listed fish species beyond those anticipated to occur through implementation of the smelt biological opinion and salmonid biological opinion using the best scientific and commercial data available.

(e) LEVEL OF DETAIL REQUIRED FOR ANALYSIS.—In articulating the determinations required under this section, the Secretary of the Interior and the Secretary of Commerce shall fully satisfy the requirements herein but shall not be expected to provide a greater level of supporting detail for the analysis than feasible to provide within the short timeframe permitted for timely real-time decisionmaking in response to changing conditions in the Delta.

SEC. 4004. CONSULTATION ON COORDINATED OPERATIONS.

(a) RESOLUTION OF WATER RESOURCE ISSUES.—In furtherance of the policy established by section 2(c)(2) of the Endangered Species Act of 1973, that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species, in any consultation or reconsultation on the coordinated operations of the Central Valley Project and the State Water Project, the Secretaries of the Interior and Commerce shall ensure that any public water agency that contracts for the delivery of water from the Central Valley Project or the State Water Project that so requests shall—

(1) have routine and continuing opportunities to discuss and submit information to the action agency for consideration during the development of any biological assessment;

(2) be informed by the action agency of the schedule for preparation of a biological assessment;

(3) be informed by the consulting agency, the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, of the schedule for preparation of the biological opinion at such time as the biological assessment is submitted to the consulting agency by the action agency;

(4) receive a copy of any draft biological opinion and have the opportunity to review that document and provide comment to the consulting agency through the action agency, which comments will be afforded due consideration during the consultation;

(5) have the opportunity to confer with the action agency and applicant, if any, about reasonable and prudent alternatives prior to the action agency or applicant identifying one or more reasonable and prudent alternatives for consideration by the consulting agency; and

(6) where the consulting agency suggests a reasonable and prudent alternative be informed—

(A) how each component of the alternative will contribute to avoiding jeopardy or adverse modification of critical habitat and the scientific data or information that supports each component of the alternative; and

(B) why other proposed alternative actions that would have fewer adverse water supply and economic impacts are inadequate to avoid jeopardy or adverse modification of critical habitat.

(b) INPUT.—When consultation is ongoing, the Secretaries of the Interior and Commerce shall regularly solicit input from and report their progress to the Collaborative Adaptive Management

Team and the Collaborative Science and Adaptive Management Program policy group. The Collaborative Adaptive Management Team and the Collaborative Science and Adaptive Management Program policy group may provide the Secretaries with recommendations to improve the effects analysis and Federal agency determinations. The Secretaries shall give due consideration to the recommendations when developing the Biological Assessment and Biological Opinion.

(c) MEETINGS.—The Secretaries shall establish a quarterly stakeholder meeting during any consultation or reconsultation for the purpose of providing updates on the development of the Biological Assessment and Biological Opinion. The quarterly stakeholder meeting shall be open to stakeholders identified by the Secretaries representing a broad range of interests including environmental, recreational and commercial fishing, agricultural, municipal, Delta, and other regional interests, and including stakeholders that are not state or local agencies.

(d) CLARIFICATION.—Neither subsection (b) or (c) of this section may be used to meet the requirements of subsection (a).

(e) NON-APPLICABILITY OF FACA.—For the purposes of subsection (b), the Collaborative Adaptive Management Team, the Collaborative Science and Adaptive Management Program policy group, and any recommendations made to the Secretaries, are exempt from the Federal Advisory Committee Act.

SEC. 4005. PROTECTIONS.

(a) APPLICABILITY.—This section shall apply only to sections 4001 through 4006.

(b) OFFSET FOR STATE WATER PROJECT.—

(1) IMPLEMENTATION IMPACTS.—The Secretary of the Interior shall confer with the California Department of Fish and Wildlife in connection with the implementation of the applicable provisions of this subtitle on potential impacts to any consistency determination for operations of the State Water Project issued pursuant to California Fish and Game Code section 2080.1.

(2) ADDITIONAL YIELD.—If, as a result of the application of the applicable provisions of this subtitle, the California Department of Fish and Wildlife—

(A) determines that operations of the State Water Project are inconsistent with the consistency determinations issued pursuant to California Fish and Game Code section 2080.1 for operations of the State Water Project; or

(B) requires take authorization under California Fish and Game Code section 2081 for operation of the State Water Project;

in a manner that directly or indirectly results in reduced water supply to the State Water Project as compared with the water supply available under the smelt biological opinion and the salmonid biological opinion; and as a result, Central Valley Project yield is greater than it otherwise would have been, then that additional yield shall be made available to the State Water Project for delivery to State Water Project contractors to offset that reduced water supply, provided that if it is necessary to reduce water supplies for any Central Valley Project authorized uses or contractors to make available to the State

Water Project that additional yield, such reductions shall be applied proportionately to those uses or contractors that benefit from that increased yield.

(3) NOTIFICATION RELATED TO ENVIRONMENTAL PROTECTIONS.—The Secretary of the Interior and Secretary of Commerce shall—

(A) notify the Director of the California Department of Fish and Wildlife regarding any changes in the manner in which the smelt biological opinion or the salmonid biological opinion is implemented; and

(B) confirm that those changes are consistent with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(4) SAVINGS.—Nothing in the applicable provisions of this subtitle shall have any effect on the application of the California Endangered Species Act (California Fish and Game Code sections 2050 through 2116).

(c) AREA OF ORIGIN AND WATER RIGHTS PROTECTIONS.—

(1) IN GENERAL.—The Secretary of the Interior and the Secretary of Commerce, in carrying out the mandates of the applicable provisions of this subtitle, shall take no action that—

(A) diminishes, impairs, or otherwise affects in any manner any area of origin, watershed of origin, county of origin, or any other water rights protection, including rights to water appropriated before December 19, 1914, provided under State law;

(B) limits, expands or otherwise affects the application of section 10505, 10505.5, 11128, 11460, 11461, 11462, 11463 or 12200 through 12220 of the California Water Code or any other provision of State water rights law, without respect to whether such a provision is specifically referred to in this section; or

(C) diminishes, impairs, or otherwise affects in any manner any water rights or water rights priorities under applicable law.

(2) EFFECT OF ACT.—

(A) Nothing in the applicable provisions of this subtitle affects or modifies any obligation of the Secretary of the Interior under section 8 of the Act of June 17, 1902 (32 Stat. 390, chapter 1093).

(B) Nothing in the applicable provisions of this subtitle diminishes, impairs, or otherwise affects in any manner any Project purposes or priorities for the allocation, delivery or use of water under applicable law, including the Project purposes and priorities established under section 3402 and section 3406 of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706).

(d) NO REDIRECTED ADVERSE IMPACTS.—

(1) IN GENERAL.—The Secretary of the Interior and Secretary of Commerce shall not carry out any specific action authorized under the applicable provisions of this subtitle that would directly or through State agency action indirectly result in the involuntary reduction of water supply to an individual, district, or agency that has in effect a contract for water with the State Water Project or the Central Valley Project, including Settlement and Exchange contracts, refuge contracts, and Friant Division contracts, as compared to the water supply

that would be provided in the absence of action under this subtitle, and nothing in this section is intended to modify, amend or affect any of the rights and obligations of the parties to such contracts.

(2) ACTION ON DETERMINATION.—If, after exploring all options, the Secretary of the Interior or the Secretary of Commerce makes a final determination that a proposed action under the applicable provisions of this subtitle cannot be carried out in accordance with paragraph (1), that Secretary—

(A) shall document that determination in writing for that action, including a statement of the facts relied on, and an explanation of the basis, for the decision; and

(B) is subject to applicable law, including the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(e) ALLOCATIONS FOR SACRAMENTO VALLEY WATER SERVICE CONTRACTORS.—

(1) DEFINITIONS.—In this subsection:

(A) EXISTING CENTRAL VALLEY PROJECT AGRICULTURAL WATER SERVICE CONTRACTOR WITHIN THE SACRAMENTO RIVER WATERSHED.—The term "existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed" means any water service contractor within the Shasta, Trinity, or Sacramento River division of the Central Valley Project that has in effect a water service contract on the date of enactment of this subtitle that provides water for irrigation.

(B) YEAR TERMS.—The terms "Above Normal", "Below Normal", "Dry", and "Wet", with respect to a year, have the meanings given those terms in the Sacramento Valley Water Year Type (40–30–30) Index.

(2) ALLOCATIONS OF WATER.—

(A) ALLOCATIONS.—Subject to paragraph (3), the Secretary of the Interior shall make every reasonable effort in the operation of the Central Valley Project to allocate water provided for irrigation purposes to each existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in accordance with the following:

(i) Not less than 100 percent of the contract quantity of the existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in a "Wet" year.

(ii) Not less than 100 percent of the contract quantity of the existing Central Valley Project agricultural water service Contractor within the Sacramento River Watershed in an "Above Normal" year.

(iii) Not less than 100 percent of the contract quantity of the existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in a "Below Normal" year that is preceded by an "Above Normal" or "Wet" year.

(iv) Not less than 50 percent of the contract quantity of the existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in a "Dry" year that is preceded by a "Below Normal", "Above Normal", or "Wet" year.

(v) In any other year not identified in any of clauses (i) through (iv), not less than twice the allocation percentage to south-of-Delta Central Valley Project agricultural water service contractors, up to 100 percent.

(B) EFFECT OF CLAUSE.—In the event of anomalous circumstances, nothing in clause (A)(v) precludes an allocation to an existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed that is greater than twice the allocation percentage to a south-of-Delta Central Valley Project agricultural water service contractor.

(3) PROTECTION OF ENVIRONMENT, MUNICIPAL AND INDUSTRIAL SUPPLIES, AND OTHER CONTRACTORS.—

(A) ENVIRONMENT.—Nothing in paragraph (2) shall adversely affect any protections for the environment, including—

(i) the obligation of the Secretary of the Interior to make water available to managed wetlands pursuant to section 3406(d) of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4722); or

(ii) any obligation—

(I) of the Secretary of the Interior and the Secretary of Commerce under the smelt biological opinion, the salmonid biological opinion, or any other applicable biological opinion; including the Shasta Dam cold water pool requirements as set forth in the salmonid biological opinion or any other applicable State or Federal law (including regulations); or

(II) under the Endangered Species Act of 1973 (16 U.S.C. et seq.), the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706), or any other applicable State or Federal law (including regulations).

(B) MUNICIPAL AND INDUSTRIAL SUPPLIES.—Nothing in paragraph (2) shall—

(i) modify any provision of a water service contract that addresses municipal or industrial water shortage policies of the Secretary of the Interior and the Secretary of Commerce;

(ii) affect or limit the authority of the Secretary of the Interior and the Secretary of Commerce to adopt or modify municipal and industrial water shortage policies;

(iii) affect or limit the authority of the Secretary of the Interior and the Secretary of Commerce to implement a municipal or industrial water shortage policy;

(iv) constrain, govern, or affect, directly or indirectly, the operations of the American River division of the Central Valley Project or any deliveries from that division or a unit or facility of that division; or

(v) affects any allocation to a Central Valley Project municipal or industrial water service contractor by increasing or decreasing allocations to the contractor,

as compared to the allocation the contractor would have received absent paragraph (2).

(C) OTHER CONTRACTORS.—Nothing in paragraph (2) shall—

(i) affect the priority of any individual or entity with a Sacramento River settlement contract over water service or repayment contractors;

(ii) affect the obligation of the United States to make a substitute supply of water available to the San Joaquin River exchange contractors;

(iii) affect the allocation of water to Friant division contractors of the Central Valley Project;

(iv) result in the involuntary reduction in contract water allocations to individuals or entities with contracts to receive water from the Friant division;

(v) result in the involuntary reduction in water allocations to refuge contractors; or

(vi) authorize any actions inconsistent with State water rights law.

SEC. 4006. NEW MELONES RESERVOIR.

The Commissioner is directed to work with local water and irrigation districts in the Stanislaus River Basin to ascertain the water storage made available by the Draft Plan of Operations in New Melones Reservoir (DRPO) for water conservation programs, conjunctive use projects, water transfers, rescheduled project water and other projects to maximize water storage and ensure the beneficial use of the water resources in the Stanislaus River Basin. All such programs and projects shall be implemented according to all applicable laws and regulations. The source of water for any such storage program at New Melones Reservoir shall be made available under a valid water right, consistent with the State water transfer guidelines and any other applicable State water law. The Commissioner shall inform the Congress within 18 months setting forth the amount of storage made available by the DRPO that has been put to use under this program, including proposals received by the Commissioner from interested parties for the purpose of this section.

SEC. 4007. STORAGE.

43 USC 390b note.

(a) DEFINITIONS.—In this subtitle:

(1) FEDERALLY OWNED STORAGE PROJECT.—The term "federally owned storage project" means any project involving a surface water storage facility in a Reclamation State—

(A) to which the United States holds title; and

(B) that was authorized to be constructed, operated, and maintained pursuant to the reclamation laws.

(2) STATE-LED STORAGE PROJECT.—The term "State-led storage project" means any project in a Reclamation State that—

(A) involves a groundwater or surface water storage facility constructed, operated, and maintained by any State, department of a State, subdivision of a State, or public agency organized pursuant to State law; and

(B) provides a benefit in meeting any obligation under Federal law (including regulations).

(b) FEDERALLY OWNED STORAGE PROJECTS.—

(1) AGREEMENTS.—On the request of any State, any department, agency, or subdivision of a State, or any public agency

organized pursuant to State law, the Secretary of the Interior may negotiate and enter into an agreement on behalf of the United States for the design, study, and construction or expansion of any federally owned storage project in accordance with this section.

(2) FEDERAL COST SHARE.—Subject to the requirements of this subsection, the Secretary of the Interior may participate in a federally owned storage project in an amount equal to not more than 50 percent of the total cost of the federally owned storage project.

(3) COMMENCEMENT.—The construction of a federally owned storage project that is the subject of an agreement under this subsection shall not commence until the Secretary of the Interior—

(A) determines that the proposed federally owned storage project is feasible in accordance with the reclamation laws;

(B) secures an agreement providing upfront funding as is necessary to pay the non-Federal share of the capital costs; and

(C) determines that, in return for the Federal cost-share investment in the federally owned storage project, at least a proportionate share of the project benefits are Federal benefits, including water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges.

(4) ENVIRONMENTAL LAWS.—In participating in a federally owned storage project under this subsection, the Secretary of the Interior shall comply with all applicable environmental laws, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(c) STATE-LED STORAGE PROJECTS.—

(1) IN GENERAL.—Subject to the requirements of this subsection, the Secretary of the Interior may participate in a State-led storage project in an amount equal to not more than 25 percent of the total cost of the State-led storage project.

(2) REQUEST BY GOVERNOR.—Participation by the Secretary of the Interior in a State-led storage project under this subsection shall not occur unless—

(A) the participation has been requested by the Governor of the State in which the State-led storage project is located;

(B) the State or local sponsor determines, and the Secretary of the Interior concurs, that—

(i) the State-led storage project is technically and financially feasible and provides a Federal benefit in accordance with the reclamation laws;

(ii) sufficient non-Federal funding is available to complete the State-led storage project; and

(iii) the State-led storage project sponsors are financially solvent;

(C) the Secretary of the Interior determines that, in return for the Federal cost-share investment in the State-led storage project, at least a proportional share of the project benefits are the Federal benefits, including water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges; and

(D) the Secretary of the Interior submits to Congress a written notification of these determinations within 30 days of making such determinations.

(3) ENVIRONMENTAL LAWS.—When participating in a State-led storage project under this subsection, the Secretary shall comply with all applicable environmental laws, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(4) INFORMATION.—When participating in a State-led storage project under this subsection, the Secretary of the Interior—

(A) may rely on reports prepared by the sponsor of the State-led storage project, including feasibility (or equivalent) studies, environmental analyses, and other pertinent reports and analyses; but

(B) shall retain responsibility for making the independent determinations described in paragraph (2).

(d) AUTHORITY TO PROVIDE ASSISTANCE.—The Secretary of the Interior may provide financial assistance under this subtitle to carry out projects within any Reclamation State.

(e) RIGHTS TO USE CAPACITY.—Subject to compliance with State water rights laws, the right to use the capacity of a federally owned storage project or State-led storage project for which the Secretary of the Interior has entered into an agreement under this subsection shall be allocated in such manner as may be mutually agreed to by the Secretary of the Interior and each other party to the agreement.

(f) COMPLIANCE WITH CALIFORNIA WATER BOND.—

(1) IN GENERAL.—The provision of Federal funding for construction of a State-led storage project in the State of California shall be subject to the condition that the California Water Commission shall determine that the State-led storage project is consistent with the California Water Quality, Supply, and Infrastructure Improvement Act, approved by California voters on November 4, 2014.

(2) APPLICABILITY.—This subsection expires on the date on which State bond funds available under the Act referred to in paragraph (1) are expended.

(g) PARTNERSHIP AND AGREEMENTS.—The Secretary of the Interior, acting through the Commissioner, may partner or enter into an agreement regarding the water storage projects identified in section 103(d)(1) of the Water Supply, Reliability, and Environmental Improvement Act (Public Law 108–361; 118 Stat. 1688) with local joint powers authorities formed pursuant to State law by irrigation districts and other local water districts and local governments within the applicable hydrologic region, to advance those projects.

(h) AUTHORIZATION OF APPROPRIATIONS.—

(1) $335,000,000 of funding in section 4011(e) is authorized to remain available until expended.

(2) Projects can only receive funding if enacted appropriations legislation designates funding to them by name, after the Secretary recommends specific projects for funding pursuant to this section and transmits such recommendations to the appropriate committees of Congress.

(i) SUNSET.—This section shall apply only to federally owned storage projects and State-led storage projects that the Secretary of the Interior determines to be feasible before January 1, 2021.

(j) CONSISTENCY WITH STATE LAW.—Nothing in this section preempts or modifies any obligation of the United States to act in conformance with applicable State law.

(k) CALFED AUTHORIZATION.—Title I of Public Law 108–361 (the Calfed Bay-Delta Authorization Act) (118 Stat. 1681; 123 Stat. 2860; 128 Stat. 164; 128 Stat. 2312) (as amended by section 207 of Public Law 114–113) is amended by striking "2017" each place it appears and inserting "2019".

SEC. 4008. LOSSES CAUSED BY THE CONSTRUCTION AND OPERATION OF STORAGE PROJECTS.

(a) MARINAS, RECREATIONAL FACILITIES, OTHER BUSINESSES.—If in constructing any new or modified water storage project included in section 103(d)(1)(A) of Public Law 108–361 (118 Stat. 1684), the Bureau of Reclamation destroys or otherwise adversely affects any existing marina, recreational facility, or other water-dependent business when constructing or operating a new or modified water storage project, the Secretaries of the Interior and Agriculture, acting through the Bureau and the Forest Service shall—

(1) provide compensation otherwise required by law; and

(2) provide the owner of the affected marina, recreational facility, or other water-dependent business under mutually agreeable terms and conditions with the right of first refusal to construct and operate a replacement marina, recreational facility, or other water-dependent business, as the case may be, on United States land associated with the new or modified water storage project.

(b) HYDROELECTRIC PROJECTS.—If in constructing any new or modified water storage project included in section 103(d)(1)(A) of Public Law 108-361 (118 Stat. 1684), the Bureau of Reclamation reduces or eliminates the capacity or generation of any existing non-Federal hydroelectric project by inundation or otherwise, the Secretary of the Interior shall, subject to the requirements and limitations of this section—

(1) provide compensation otherwise required by law;

(2) provide the owner of the affected hydroelectric project under mutually agreeable terms and conditions with a right of first refusal to construct, operate, and maintain replacement hydroelectric generating facilities at such new or modified water storage project on Federal land associated with the new or modified water storage project or on private land owned by the affected hydroelectric project owner;

(3) provide compensation for the construction of any water conveyance facilities as are necessary to convey water to any new powerhouse constructed by such owner in association with such new hydroelectric generating facilities;

(4) provide for paragraphs (1), (2), and (3) at a cost not to exceed the estimated value of the actual impacts to any existing non-Federal hydroelectric project, including impacts to its capacity and energy value, and as estimated for the associated feasibility study, including additional planning, environmental, design, construction, and operations and maintenance costs for existing and replacement facilities; and

(5) ensure that action taken under paragraphs (1), (2), (3), and (4) shall not directly or indirectly increase the costs to recipients of power marketed by the Western Area Power Administration, nor decrease the value of such power.

(c) EXISTING LICENSEE.—The owner of any project affected under subsection (b)(2) shall be deemed the existing licensee, in accordance with section 15(a) of the Act of June 10, 1920 (16 U.S.C. 808(a)), for any replacement project to be constructed within the proximate geographic area of the affected project.

(d) COST ALLOCATION.—

(1) COMPENSATION.—Any compensation under this section shall be a project cost allocated solely to the direct beneficiaries of the new or modified water project constructed under this section.

(2) REPLACEMENT COSTS.—The costs of the replacement project, and any compensation, shall be—

(A) treated as a stand-alone project and shall not be financially integrated in any other project; and

(B) allocated in accordance with mutually agreeable terms between the Secretary and project beneficiaries.

(e) APPLICABILITY.—This section shall only apply to federally owned water storage projects whether authorized under section 4007 or some other authority.

(f) LIMITATION.—Nothing in this section affects the ability of landowners or Indian tribes to seek compensation or any other remedy otherwise provided by law.

(g) SAVINGS CLAUSE.—No action taken under this section shall directly or indirectly increase the costs to recipients of power marketed by the Western Area Power Administration, nor decrease the value of such power.

SEC. 4009. OTHER WATER SUPPLY PROJECTS.

(a) WATER DESALINATION ACT AMENDMENTS.—Section 4 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298) is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively; and

(B) by inserting after paragraph (1) the following:

"(1) PROJECTS.—

"(A) IN GENERAL.—Subject to the requirements of this subsection, the Secretary of the Interior may participate in an eligible desalination project in an amount equal to not more than 25 percent of the total cost of the eligible desalination project.

"(B) ELIGIBLE DESALINATION PROJECT.—The term 'eligible desalination project' means any project in a Reclamation State, that—

"(i) involves an ocean or brackish water desalination facility either constructed, operated and maintained; or sponsored by any State, department of a State, subdivision of a State or public agency organized pursuant to a State law; and

"(ii) provides a Federal benefit in accordance with the reclamation laws (including regulations).

"(C) STATE ROLE.—Participation by the Secretary of the Interior in an eligible desalination project under this subsection shall not occur unless—

"(i) the project is included in a state-approved plan or federal participation has been requested by the Governor of the State in which the eligible desalination project is located; and

"(ii) the State or local sponsor determines, and the Secretary of the Interior concurs, that—

"(I) the eligible desalination project is technically and financially feasible and provides a Federal benefit in accordance with the reclamation laws;

"(II) sufficient non-Federal funding is available to complete the eligible desalination project; and

"(III) the eligible desalination project sponsors are financially solvent; and

"(iii) the Secretary of the Interior submits to Congress a written notification of these determinations within 30 days of making such determinations.

"(D) ENVIRONMENTAL LAWS.—When participating in an eligible desalination project under this subsection, the Secretary shall comply with all applicable environmental laws, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

"(E) INFORMATION.—When participating in an eligible desalination project under this subsection, the Secretary of the Interior—

"(i) may rely on reports prepared by the sponsor of the eligible desalination project, including feasibility (or equivalent) studies, environmental analyses, and other pertinent reports and analyses; but

"(ii) shall retain responsibility for making the independent determinations described in subparagraph (C).

"(F) AUTHORIZATION OF APPROPRIATIONS.—

"(i) $30,000,000 of funding is authorized to remain available until expended; and

"(ii) Projects can only receive funding if enacted appropriations legislation designates funding to them by name, after the Secretary recommends specific projects for funding pursuant to this subsection and transmits such recommendations to the appropriate committees of Congress.".

(c) AUTHORIZATION OF NEW WATER RECYCLING AND REUSE PROJECTS.—Section 1602 of the Reclamation Wastewater and Groundwater Study and Facilities Act (title XVI of Public Law 102–575; 43 U.S.C. 390h et. seq.) is amended by adding at the end the following new subsections:

"(e) AUTHORIZATION OF NEW WATER RECYCLING AND REUSE PROJECTS.—

"(1) SUBMISSION TO THE SECRETARY.—

"(A) IN GENERAL.—Non-Federal interests may submit proposals for projects eligible to be authorized pursuant to this section in the form of completed feasibility studies to the Secretary.

"(B) ELIGIBLE PROJECTS.—A project shall be considered eligible for consideration under this section if the project reclaims and reuses—

"(i) municipal, industrial, domestic, or agricultural wastewater; or

"(ii) impaired ground or surface waters.

"(C) GUIDELINES.—Within 60 days of the enactment of this Act the Secretary shall issue guidelines for feasibility studies for water recycling and reuse projects to provide sufficient information for the formulation of the studies.

"(2) REVIEW BY THE SECRETARY.—The Secretary shall review each feasibility study received under paragraph (1)(A) for the purpose of—

"(A) determining whether the study, and the process under which the study was developed, each comply with Federal laws and regulations applicable to feasibility studies of water recycling and reuse projects; and

"(B) the project is technically and financially feasible and provides a Federal benefit in accordance with the reclamation laws.

"(3) SUBMISSION TO CONGRESS.—Not later than 180 days after the date of receipt of a feasibility study received under paragraph (1)(A), the Secretary shall submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives a report that describes—

"(A) the results of the Secretary's review of the study under paragraph (2), including a determination of whether the project is feasible;

"(B) any recommendations the Secretary may have concerning the plan or design of the project; and

"(C) any conditions the Secretary may require for construction of the project.

"(4) ELIGIBILITY FOR FUNDING.—The non-Federal project sponsor of any project determined by the Secretary to be feasible under paragraph (3)(A) shall be eligible to apply to the Secretary for funding for the Federal share of the costs of planning, designing and constructing the project pursuant to subsection (f).

"(f) COMPETITIVE GRANT PROGRAM FOR THE FUNDING OF WATER RECYCLING AND REUSE PROJECTS.—

"(1) ESTABLISHMENT.—The Secretary shall establish a competitive grant program under which the non-Federal project sponsor of any project determined by the Secretary to be feasible under subsection (e)(3)(A) shall be eligible to apply for funding for the planning, design, and construction of the project, subject to subsection (g)(2).

"(2) PRIORITY.—When funding projects under paragraph (1), the Secretary shall give funding priority to projects that meet one or more of the criteria listed in paragraph (3) and are located in an area that—

"(A) has been identified by the United States Drought Monitor as experiencing severe, extreme, or exceptional drought at any time in the 4-year period before such funds are made available; or

"(B) was designated as a disaster area by a State during the 4-year period before such funds are made available.

"(3) CRITERIA.—The project criteria referred to in paragraph (2) are the following:

"(A) Projects that are likely to provide a more reliable water supply for States and local governments.

"(B) Projects that are likely to increase the water management flexibility and reduce impacts on environmental resources from projects operated by Federal and State agencies.

"(C) Projects that are regional in nature.

"(D) Projects with multiple stakeholders.

"(E) Projects that provide multiple benefits, including water supply reliability, eco-system benefits, groundwater management and enhancements, and water quality improvements.

"(g) AUTHORIZATION OF APPROPRIATIONS.—

"(1) There is authorized to be appropriated to the Secretary of the Interior an additional $50,000,000 to remain available until expended.

"(2) Projects can only receive funding if enacted appropriations legislation designates funding to them by name, after the Secretary recommends specific projects for funding pursuant to subsection (f) and transmits such recommendations to the appropriate committees of Congress.".

42 USC 10364 note.

(d) FUNDING.—Section 9504 of the Omnibus Public Land Management Act of 2009 (42 U.S.C. 10364) is amended in subsection (e) by striking "$350,000,000" and inserting "$450,000,000" on the condition that of that amount, $50,000,000 of it is used to carry out section 206 of the Energy and Water Development and Related Agencies Appropriation Act, 2015 (43 U.S.C. 620 note; Public Law 113–235).

SEC. 4010. ACTIONS TO BENEFIT THREATENED AND ENDANGERED SPECIES AND OTHER WILDLIFE.

(a) INCREASED REAL-TIME MONITORING AND UPDATED SCIENCE.—

(1) SMELT BIOLOGICAL OPINION.—The Director shall use the best scientific and commercial data available to implement, continuously evaluate, and refine or amend, as appropriate, the reasonable and prudent alternative described in the smelt biological opinion.

(2) INCREASED MONITORING TO INFORM REAL-TIME OPERATIONS.—

(A) IN GENERAL.—The Secretary of the Interior shall conduct additional surveys, on an annual basis at the appropriate time of year based on environmental conditions, in collaboration with interested stakeholders regarding the science of the Delta in general, and to enhance real time decisionmaking in particular, working in close coordination with relevant State authorities.

(B) REQUIREMENTS.—In carrying out this subsection, the Secretary of the Interior shall use—

(i) the most appropriate and accurate survey methods available for the detection of Delta smelt to determine the extent to which adult Delta smelt are distributed in relation to certain levels of turbidity or other environmental factors that may influence salvage rate;

(ii) results from appropriate surveys for the detection of Delta smelt to determine how the Central Valley Project and State Water Project may be operated more

efficiently to maximize fish and water supply benefits; and

(iii) science-based recommendations developed by any of the persons or entities described in paragraph (4)(B) to inform the agencies' real-time decisions.

(C) WINTER MONITORING.—During the period between December 1 and March 31, if suspended sediment loads enter the Delta from the Sacramento River, and the suspended sediment loads appear likely to raise turbidity levels in the Old River north of the export pumps from values below 12 Nephelometric Turbidity Units (NTUs) to values above 12 NTUs, the Secretary of the Interior shall—

(i) conduct daily monitoring using appropriate survey methods at locations including the vicinity of Station 902 to determine the extent to which adult Delta smelt are moving with turbidity toward the export pumps; and

(ii) use results from the monitoring under subparagraph (A) to determine how increased trawling can inform daily real-time Central Valley Project and State Water Project operations to maximize fish and water supply benefits.

(3) PERIODIC REVIEW OF MONITORING.—Not later than 1 year after the date of enactment of this subtitle, the Secretary of the Interior shall—

(A) evaluate whether the monitoring program under paragraph (2), combined with other monitoring programs for the Delta, is providing sufficient data to inform Central Valley Project and State Water Project operations to maximize the water supply for fish and water supply benefits; and

(B) determine whether the monitoring efforts should be changed in the short or long term to provide more useful data.

(4) DELTA SMELT DISTRIBUTION STUDY.—

(A) IN GENERAL.—Not later than March 15, 2021, the Secretary of the Interior shall—

(i) complete studies, to be initiated by not later than 90 days after the date of enactment of this subtitle, designed—

(I) to understand the location and determine the abundance and distribution of Delta smelt throughout the range of the Delta smelt; and

(II) to determine potential methods to minimize the effects of Central Valley Project and State Water Project operations on the Delta smelt;

(ii) based on the best available science, if appropriate and practicable, implement new targeted sampling and monitoring of Delta smelt in order to maximize fish and water supply benefits prior to completion of the study under clause (i);

(iii) to the maximum extent practicable, use new technologies to allow for better tracking of Delta smelt, such as acoustic tagging, optical recognition during trawls, and fish detection using residual deoxyribonucleic acid (DNA); and

(iv) if new sampling and monitoring is not implemented under clause (ii), provide a detailed explanation of the determination of the Secretary of the Interior that no change is warranted.

(B) CONSULTATION.—In determining the scope of the studies under this subsection, the Secretary of the Interior shall consult with—

(i) Central Valley Project and State Water Project water contractors and public water agencies;

(ii) other public water agencies;

(iii) the California Department of Fish and Wildlife and the California Department of Water Resources; and

(iv) nongovernmental organizations.

(b) ACTIONS TO BENEFIT ENDANGERED FISH POPULATIONS.—

(1) FINDINGS.—Congress finds that—

(A) minimizing or eliminating stressors to fish populations and their habitat in an efficient and structured manner is a key aspect of a fish recovery strategy;

(B) functioning, diverse, and interconnected habitats are necessary for a species to be viable; and

(C) providing for increased fish habitat may not only allow for a more robust fish recovery, but also reduce impacts to water supplies.

(2) ACTIONS FOR BENEFIT OF ENDANGERED SPECIES.—There is authorized to be appropriated the following amounts:

(A) $15,000,000 for the Secretary of Commerce, through the Administrator of the National Oceanic and Atmospheric Administration, to carry out the following activities in accordance with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.):

(i) Gravel and rearing area additions and habitat restoration to the Sacramento River to benefit Chinook salmon and steelhead trout.

(ii) Scientifically improved and increased real-time monitoring to inform real-time operations of Shasta and related Central Valley Project facilities, and alternative methods, models, and equipment to improve temperature modeling and related forecasted information for purposes of predicting impacts to salmon and salmon habitat as a result of water management at Shasta.

(iii) Methods to improve the Delta salvage systems, including alternative methods to redeposit salvaged salmon smolts and other fish from the Delta in a manner that reduces predation losses.

(B) $3,000,000 for the Secretary of the Interior to conduct the Delta smelt distribution study referenced in subsection (a)(4).

(3) COMMENCEMENT.—If the Administrator of the National Oceanic and Atmospheric Administration determines that a proposed activity is feasible and beneficial for protecting and recovering a fish population, the Administrator shall commence implementation of the activity by not later than 1 year after the date of enactment of this subtitle.

(4) CONSULTATION.—The Administrator shall take such steps as are necessary to partner with, and coordinate the

efforts of, the Department of the Interior, the Department of Commerce, and other relevant Federal departments and agencies to ensure that all Federal reviews, analyses, opinions, statements, permits, licenses, and other approvals or decisions required under Federal law are completed on an expeditious basis, consistent with Federal law.

(5) CONSERVATION FISH HATCHERIES.—

(A) IN GENERAL.—Not later than 2 years after the date of enactment of this subtitle, the Secretaries of the Interior and Commerce, in coordination with the Director of the California Department of Fish and Wildlife, shall develop and implement as necessary the expanded use of conservation hatchery programs to enhance, supplement, and rebuild Delta smelt and Endangered Species Act-listed fish species under the smelt and salmonid biological opinions.

(B) REQUIREMENTS.—The conservation hatchery programs established under paragraph (1) and the associated hatchery and genetic management plans shall be designed—

(i) to benefit, enhance, support, and otherwise recover naturally spawning fish species to the point where the measures provided under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) are no longer necessary; and

(ii) to minimize adverse effects to Central Valley Project and State Water Project operations.

(C) PRIORITY; COOPERATIVE AGREEMENTS.—In implementing this section, the Secretaries of the Interior and Commerce—

(i) shall give priority to existing and prospective hatchery programs and facilities within the Delta and the riverine tributaries thereto; and

(ii) may enter into cooperative agreements for the operation of conservation hatchery programs with States, Indian tribes, and other nongovernmental entities for the benefit, enhancement, and support of naturally spawning fish species.

(6) ACQUISITION OF LAND, WATER, OR INTERESTS FROM WILLING SELLERS FOR ENVIRONMENTAL PURPOSES IN CALIFORNIA.—

(A) IN GENERAL.—The Secretary of the Interior is authorized to acquire by purchase, lease, donation, or otherwise, land, water, or interests in land or water from willing sellers in California—

(i) to benefit listed or candidate species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or the California Endangered Species Act (California Fish and Game Code sections 2050 through 2116);

(ii) to meet requirements of, or otherwise provide water quality benefits under, the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) or the Porter Cologne Water Quality Control Act (division 7 of the California Water Code); or

(iii) for protection and enhancement of the environment, as determined by the Secretary of the Interior.

(B) STATE PARTICIPATION.—In implementing this section, the Secretary of the Interior is authorized to participate with the State of California or otherwise hold such interests identified in subparagraph (A) in joint ownership with the State of California based on a cost share deemed appropriate by the Secretary.

(C) TREATMENT.—Any expenditures under this subsection shall be nonreimbursable and nonreturnable to the United States.

(7) REAUTHORIZATION OF THE FISHERIES RESTORATION AND IRRIGATION MITIGATION ACT OF 2000.—

(A) Section 10(a) of the Fisheries Restoration and Irrigation Mitigation Act of 2000 (16 U.S.C. 777 note; Public Law 106–502) is amended by striking "$25 million for each of fiscal years 2009 through 2015" and inserting "$15 million through 2021"; and

(B) Section 2 of the Fisheries Restoration and Irrigation Mitigation Act of 2000 (16 U.S.C. 777 note; Public Law 106–502) is amended by striking "Montana, and Idaho" and inserting "Montana, Idaho, and California".

(c) ACTIONS TO BENEFIT REFUGES.—

(1) IN GENERAL.—In addition to funding under section 3407 of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4726), there is authorized to be appropriated to the Secretary of the Interior $2,000,000 for each of fiscal years 2017 through 2021 for the acceleration and completion of water infrastructure and conveyance facilities necessary to achieve full water deliveries to Central Valley wildlife refuges and habitat areas pursuant to section 3406(d) of that Act (Public Law 102–575; 106 Stat. 4722).

(2) COST SHARING.—

(A) FEDERAL SHARE.—The Federal share of the cost of carrying out an activity described in this section shall be not more than 50 percent.

(B) NON-FEDERAL SHARE.—The non-Federal share of the cost of carrying out an activity described in this section—

(i) shall be not less than 50 percent; and

(ii) may be provided in cash or in kind.

(d) NON-FEDERAL PROGRAM TO PROTECT NATIVE ANADROMOUS FISH IN STANISLAUS RIVER.—

(1) DEFINITION OF DISTRICT.—In this section, the term "district" means—

(A) the Oakdale Irrigation District of the State of California; and

(B) the South San Joaquin Irrigation District of the State of California.

(2) ESTABLISHMENT.—The Secretary of Commerce, acting through the Assistant Administrator of the National Marine Fisheries Service, and the districts shall jointly establish and conduct a nonnative predator research and pilot fish removal program to study the effects of removing from the Stanislaus River—

(A) nonnative striped bass, smallmouth bass, largemouth bass, black bass; and

(B) other nonnative predator fish species.

(3) REQUIREMENTS.—The program under this section shall—

(A) be scientifically based, with research questions determined jointly by—

(i) National Marine Fisheries Service scientists; and

(ii) technical experts of the districts;

(B) include methods to quantify by, among other things, evaluating the number of juvenile anadromous fish that migrate past the rotary screw trap located at Caswell—

(i) the number and size of predator fish removed each year; and

(ii) the impact of the removal on—

(I) the overall abundance of predator fish in the Stanislaus River; and

(II) the populations of juvenile anadromous fish in the Stanislaus River;

(C) among other methods, consider using wire fyke trapping, portable resistance board weirs, and boat electrofishing; and

(D) be implemented as quickly as practicable after the date of issuance of all necessary scientific research permits.

(4) MANAGEMENT.—The management of the program shall be the joint responsibility of the Assistant Administrator and the districts, which shall—

(A) work collaboratively to ensure the performance of the program; and

(B) discuss and agree on, among other things—

(i) qualified scientists to lead the program;

(ii) research questions;

(iii) experimental design;

(iv) changes in the structure, management, personnel, techniques, strategy, data collection and access, reporting, and conduct of the program; and

(v) the need for independent peer review.

(5) CONDUCT.—

(A) IN GENERAL.—For each applicable calendar year, the districts, on agreement of the Assistant Administrator, may elect to conduct the program under this section using—

(i) the personnel of the Assistant Administrator or districts;

(ii) qualified private contractors hired by the districts;

(iii) personnel of, on loan to, or otherwise assigned to the National Marine Fisheries Service; or

(iv) a combination of the individuals described in clauses (i) through (iii).

(B) PARTICIPATION BY NATIONAL MARINE FISHERIES SERVICE.—

(i) IN GENERAL.—If the districts elect to conduct the program using district personnel or qualified private contractors hired under clause (i) or (ii) of subparagraph (A), the Assistant Administrator may assign an employee of, on loan to, or otherwise assigned to the National Marine Fisheries Service, to be present

for all activities performed in the field to ensure compliance with paragraph (4).

(ii) COSTS.—The districts shall pay the cost of participation by the employee under clause (i), in accordance with paragraph (6).

(C) TIMING OF ELECTION.—The districts shall notify the Assistant Administrator of an election under subparagraph (A) by not later than October 15 of the calendar year preceding the calendar year for which the election applies.

(6) FUNDING.—

(A) IN GENERAL.—The districts shall be responsible for 100 percent of the cost of the program.

(B) CONTRIBUTED FUNDS.—The Secretary of Commerce may accept and use contributions of funds from the districts to carry out activities under the program.

(C) ESTIMATION OF COST.—

(i) IN GENERAL.—Not later than December 1 of each year of the program, the Secretary of Commerce shall submit to the districts an estimate of the cost to be incurred by the National Marine Fisheries Service for the program during the following calendar year, if any, including the cost of any data collection and posting under paragraph (7).

(ii) FAILURE TO FUND.—If an amount equal to the estimate of the Secretary of Commerce is not provided through contributions pursuant to subparagraph (B) before December 31 of that calendar year—

(I) the Secretary shall have no obligation to conduct the program activities otherwise scheduled for the following calendar year until the amount is contributed by the districts; and

(II) the districts may not conduct any aspect of the program until the amount is contributed by the districts.

(D) ACCOUNTING.—

(i) IN GENERAL.—Not later than September 1 of each year, the Secretary of Commerce shall provide to the districts an accounting of the costs incurred by the Secretary for the program during the preceding calendar year.

(ii) EXCESS AMOUNTS.—If the amount contributed by the districts pursuant to subparagraph (B) for a calendar year was greater than the costs incurred by the Secretary of Commerce during that year, the Secretary shall—

(I) apply the excess amounts to the cost of activities to be performed by the Secretary under the program, if any, during the following calendar year; or

(II) if no such activities are to be performed, repay the excess amounts to the districts.

(7) PUBLICATION AND EVALUATION OF DATA.—

(A) IN GENERAL.—All data generated through the program, including by any private consultants, shall be routinely provided to the Assistant Administrator.

(B) INTERNET.—Not later than the 15th day of each month of the program, the Assistant Administrator shall publish on the Internet website of the National Marine Fisheries Service a tabular summary of the raw data collected under the program during the preceding month.

(C) REPORT.—On completion of the program, the Assistant Administrator shall prepare a final report evaluating the effectiveness of the program, including recommendations for future research and removal work.

(8) CONSISTENCY WITH LAW.—

(A) IN GENERAL.—The programs in this section and subsection (e) are found to be consistent with the requirements of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706).

(B) LIMITATION.—No provision, plan, or definition under that Act, including section 3406(b)(1) of that Act (Public Law 102–575; 106 Stat. 4714), shall be used—

(i) to prohibit the implementation of the programs in this subsection and subsection (e); or

(ii) to prevent the accomplishment of the goals of the programs.

(e) PILOT PROJECTS TO IMPLEMENT CALFED INVASIVE SPECIES PROGRAM.—

(1) IN GENERAL.—Not later than January 1, 2018, the Secretary of the Interior, in collaboration with the Secretary of Commerce, the Director of the California Department of Fish and Wildlife, and other relevant agencies and interested parties, shall establish and carry out pilot projects to implement the invasive species control program under section 103(d)(6)(A)(iv) of Public Law 108–361 (118 Stat. 1690).

(2) REQUIREMENTS.—The pilot projects under this section shall—

(A) seek to reduce invasive aquatic vegetation (such as water hyacinth), predators, and other competitors that contribute to the decline of native listed pelagic and anadromous species that occupy the Sacramento and San Joaquin Rivers and their tributaries and the Delta; and

(B) remove, reduce, or control the effects of species including Asiatic clams, silversides, gobies, Brazilian water weed, largemouth bass, smallmouth bass, striped bass, crappie, bluegill, white and channel catfish, zebra and quagga mussels, and brown bullheads.

(3) EMERGENCY ENVIRONMENTAL REVIEWS.—To expedite environmentally beneficial programs in this subtitle for the conservation of threatened and endangered species, the Secretaries of the Interior and Commerce shall consult with the Council on Environmental Quality in accordance with section 1506.11 of title 40, Code of Federal Regulations (or successor regulations), to develop alternative arrangements to comply with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) for those programs.

(f) COLLABORATIVE PROCESSES.—Notwithstanding the Federal Advisory Committee Act (5 U.S.C. App.) and applicable Federal acquisitions and contracting authorities, the Secretaries of the Interior and Commerce may use the collaborative processes under the Collaborative Science Adaptive Management Program to enter

into contracts with specific individuals or organizations directly or in conjunction with appropriate State agencies.

(g) THE "SAVE OUR SALMON ACT".—

(1) TREATMENT OF STRIPED BASS.—

(A) ANADROMOUS FISH.—Section 3403(a) of the Central Valley Project Improvement Act (title XXXIV of Public Law 102–575) is amended by striking "striped bass," after "stocks of salmon (including steelhead),".

(B) FISH AND WILDLIFE RESTORATION ACTIVITIES.—Section 3406(b) of the Central Valley Project Improvement Act (title XXXIV of Public Law 102–575) is amended by—

(i) striking paragraphs (14) and (18);

(ii) redesignating paragraphs (15) through (17) as paragraphs (14) through (16), respectively; and

(iii) redesignating paragraphs (19) through (23) as paragraphs (17) through (21), respectively.

(2) CONFORMING CHANGES.—Section 3407(a) of the Central Valley Project Improvement Act (title XXXIV of Public Law 102–575) is amended by striking "(10)–(18), and (20)–(22)" and inserting "(10)–(16), and (18)–(20)".

SEC. 4011. OFFSETS AND WATER STORAGE ACCOUNT.

(a) PREPAYMENT OF CERTAIN REPAYMENT CONTRACTS BETWEEN THE UNITED STATES AND CONTRACTORS OF FEDERALLY DEVELOPED WATER SUPPLIES.—

(1) CONVERSION AND PREPAYMENT OF CONTRACTS.—Upon request of the contractor, the Secretary of the Interior shall convert any water service contract in effect on the date of enactment of this subtitle and between the United States and a water users' association to allow for prepayment of the repayment contract pursuant to paragraph (2) under mutually agreeable terms and conditions. The manner of conversion under this paragraph shall be as follows:

(A) Water service contracts that were entered into under section (e) of the Act of August 4, 1939 (53 Stat. 1196), to be converted under this section shall be converted to repayment contracts under section 9(d) of that Act (53 Stat. 1195).

(B) Water service contracts that were entered under subsection (c)(2) of section 9 of the Act of August 4, 1939 (53 Stat. 1194), to be converted under this section shall be converted to a contract under subsection (c)(1) of section 9 of that Act (53 Stat. 1195).

(2) PREPAYMENT.—Except for those repayment contracts under which the contractor has previously negotiated for prepayment, all repayment contracts under section 9(d) of that Act (53 Stat. 1195) in effect on the date of enactment of this subtitle at the request of the contractor, and all contracts converted pursuant to paragraph (1)(A) shall—

(A) provide for the repayment, either in lump sum or by accelerated prepayment, of the remaining construction costs identified in water project specific irrigation rate repayment schedules, as adjusted to reflect payment not reflected in such schedules, and properly assignable for ultimate return by the contractor, or if made in approximately equal installments, no later than 3 years after the effective date of the repayment contract, such amount

to be discounted by 1Ú the Treasury rate. An estimate of the remaining construction costs, as adjusted, shall be provided by the Secretary to the contractor no later than 90 days following receipt of request of the contractor;

(B) require that construction costs or other capitalized costs incurred after the effective date of the contract or not reflected in the rate schedule referenced in subparagraph (A), and properly assignable to such contractor shall be repaid in not more than 5 years after notification of the allocation if such amount is a result of a collective annual allocation of capital costs to the contractors exercising contract conversion under this subsection of less than $5,000,000. If such amount is $5,000,000 or greater, such cost shall be repaid as provided by applicable reclamation law;

(C) provide that power revenues will not be available to aid in repayment of construction costs allocated to irrigation under the contract; and

(D) continue so long as the contractor pays applicable charges, consistent with section 9(d) of the Act of August 4, 1939 (53 Stat. 1195), and applicable law.

(3) CONTRACT REQUIREMENTS.—Except for those repayment contracts under which the contractor has previously negotiated for prepayment, the following shall apply with regard to all repayment contracts under subsection (c)(1) of section 9 of that Act (53 Stat. 1195) in effect on the date of enactment of this subtitle at the request of the contractor, and all contracts converted pursuant to paragraph (1)(B):

(A) Provide for the repayment in lump sum of the remaining construction costs identified in water project specific municipal and industrial rate repayment schedules, as adjusted to reflect payments not reflected in such schedules, and properly assignable for ultimate return by the contractor. An estimate of the remaining construction costs, as adjusted, shall be provided by the Secretary to the contractor no later than 90 days after receipt of the request of contractor.

(B) The contract shall require that construction costs or other capitalized costs incurred after the effective date of the contract or not reflected in the rate schedule referenced in subparagraph (A), and properly assignable to such contractor, shall be repaid in not more than 5 years after notification of the allocation if such amount is a result of a collective annual allocation of capital costs to the contractors exercising contract conversion under this subsection of less than $5,000,000. If such amount is $5,000,000 or greater, such cost shall be repaid as provided by applicable reclamation law.

(C) Continue so long as the contractor pays applicable charges, consistent with section 9(c)(1) of the Act of August 4, 1939 (53 Stat. 1195), and applicable law.

(4) CONDITIONS.—All contracts entered into pursuant to paragraphs (1), (2), and (3) shall—

(A) not be adjusted on the basis of the type of prepayment financing used by the water users' association;

(B) conform to any other agreements, such as applicable settlement agreements and new constructed appurtenant facilities; and

(C) not modify other water service, repayment, exchange and transfer contractual rights between the water users' association, and the Bureau of Reclamation, or any rights, obligations, or relationships of the water users' association and their landowners as provided under State law.

(b) ACCOUNTING.—The amounts paid pursuant to subsection (a) shall be subject to adjustment following a final cost allocation by the Secretary of the Interior. In the event that the final cost allocation indicates that the costs properly assignable to the contractor are greater than what has been paid by the contractor, the contractor shall be obligated to pay the remaining allocated costs. The term of such additional repayment contract shall be not less than one year and not more than 10 years, however, mutually agreeable provisions regarding the rate of repayment of such amount may be developed by the parties. In the event that the final cost allocation indicates that the costs properly assignable to the contractor are less than what the contractor has paid, the Secretary shall credit such overpayment as an offset against any outstanding or future obligation of the contractor, with the exception of Restoration Fund charges pursuant to section 3407(d) of Public Law 102–575.

(c) APPLICABILITY OF CERTAIN PROVISIONS.—

(1) EFFECT OF EXISTING LAW.—Upon a contractor's compliance with and discharge of the obligation of repayment of the construction costs pursuant to a contract entered into pursuant to subsection (a)(2)(A), subsections (a) and (b) of section 213 of the Reclamation Reform Act of 1982 (96 Stat. 1269) shall apply to affected lands.

(2) EFFECT OF OTHER OBLIGATIONS.—The obligation of a contractor to repay construction costs or other capitalized costs described in subsection (a)(2)(B), (a)(3)(B), or (b) shall not affect a contractor's status as having repaid all of the construction costs assignable to the contractor or the applicability of subsections (a) and (b) of section 213 of the Reclamation Reform Act of 1982 (96 Stat. 1269) once the amount required to be paid by the contractor under the repayment contract entered into pursuant to subsection (a)(2)(A) has been paid.

(d) EFFECT ON EXISTING LAW NOT ALTERED.—Implementation of the provisions of this subtitle shall not alter—

(1) the repayment obligation of any water service or repayment contractor receiving water from the same water project, or shift any costs that would otherwise have been properly assignable to the water users' association identified in subsections (a)(1), (a)(2), and (a)(3) absent this section, including operation and maintenance costs, construction costs, or other capitalized costs incurred after the date of the enactment of this subtitle, or to other contractors; and

(2) specific requirements for the disposition of amounts received as repayments by the Secretary under the Act of June 17, 1902 (32 Stat. 388, chapter 1093), and Acts supplemental to and amendatory of that Act (43 U.S.C. 371 et seq.);

(3) the priority of a water service or repayment contractor to receive water; or

(4) except as expressly provided in this section, any obligations under the reclamation law, including the continuation of Restoration Fund charges pursuant to section 3407(d) (Public Law 102–575), of the water service and repayment contractors making prepayments pursuant to this section.

(e) WATER STORAGE ENHANCEMENT PROGRAM.—

(1) IN GENERAL.—Except as provided in subsection (d)(2), $335,000,000 out of receipts generated from prepayment of contracts under this section beyond amounts necessary to cover the amount of receipts forgone from scheduled payments under current law for the 10-year period following the date of enactment of this Act shall be directed to the Reclamation Water Storage Account under paragraph (2).

(2) STORAGE ACCOUNT.—The Secretary shall allocate amounts collected under paragraph (1) into the "Reclamation Storage Account" to fund the construction of water storage. The Secretary may also enter into cooperative agreements with water users' associations for the construction of water storage and amounts within the Storage Account may be used to fund such construction. Water storage projects that are otherwise not federally authorized shall not be considered Federal facilities as a result of any amounts allocated from the Storage Account for part or all of such facilities.

(3) REPAYMENT.—Amounts used for water storage construction from the Account shall be fully reimbursed to the Account consistent with the requirements under Federal reclamation law (the Act of June 17, 1902 (32 Stat. 388, chapter 1093), and Acts supplemental to and amendatory of that Act (43 U.S.C. 371 et seq.)) except that all funds reimbursed shall be deposited in the Account established under paragraph (2).

(4) AVAILABILITY OF AMOUNTS.—Amounts deposited in the Account under this subsection shall—

(A) be made available in accordance with this section, subject to appropriation; and

(B) be in addition to amounts appropriated for such purposes under any other provision of law.

(f) DEFINITIONS.—For the purposes of this subtitle, the following definitions apply:

(1) ACCOUNT.—The term "Account" means the Reclamation Water Storage Account established under subsection (e)(2).

(2) CONSTRUCTION.—The term "construction" means the designing, materials engineering and testing, surveying, and building of water storage including additions to existing water storage and construction of new water storage facilities, exclusive of any Federal statutory or regulatory obligations relating to any permit, review, approval, or other such requirement.

(3) WATER STORAGE.—The term "water storage" means any federally owned facility under the jurisdiction of the Bureau of Reclamation or any non-Federal facility used for the storage and supply of water resources.

(4) TREASURY RATE.—The term "Treasury rate" means the 20- year Constant Maturity Treasury (CMT) rate published by the United States Department of the Treasury existing on the effective date of the contract.

(5) WATER USERS' ASSOCIATION.—The term "water users' association" means—

(A) an entity organized and recognized under State laws that is eligible to enter into contracts with Reclamation to receive contract water for delivery to end users of the water and to pay applicable charges; and

(B) includes a variety of entities with different names and differing functions, such as associations, conservancy districts, irrigation districts, municipalities, and water project contract units.

43 USC 390b note.

SEC. 4012. SAVINGS LANGUAGE.

(a) IN GENERAL.—This subtitle shall not be interpreted or implemented in a manner that—

(1) preempts or modifies any obligation of the United States to act in conformance with applicable State law, including applicable State water law;

(2) affects or modifies any obligation under the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706), except for the savings provisions for the Stanislaus River predator management program expressly established by section 11(d) and provisions in section 11(g);

(3) overrides, modifies, or amends the applicability of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or the application of the smelt and salmonid biological opinions to the operation of the Central Valley Project or the State Water Project;

(4) would cause additional adverse effects on listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the applicable biological opinion, using the best scientific and commercial data available; or

(5) overrides, modifies, or amends any obligation of the Pacific Fisheries Management Council, required by the Magnuson Stevens Act or the Endangered Species Act of 1973, to manage fisheries off the coast of California, Oregon, or Washington.

(b) SUCCESSOR BIOLOGICAL OPINIONS.—

(1) IN GENERAL.—The Secretaries of the Interior and Commerce shall apply this Act to any successor biological opinions to the smelt or salmonid biological opinions only to the extent that the Secretaries determine is consistent with—

(A) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), its implementing regulations, and the successor biological opinions; and

(B) subsection (a)(4).

(2) LIMITATION.—Nothing in this Act shall restrict the Secretaries of the Interior and Commerce from completing consultation on successor biological opinions and through those successor biological opinions implementing whatever adjustments in operations or other activities as may be required by the Endangered Species Act of 1973 and its implementing regulations.

(c) SEVERABILITY.—If any provision of this subtitle, or any application of such provision to any person or circumstance, is held to be inconsistent with any law or the biological opinions, the remainder of this subtitle and the application of this subtitle to any other person or circumstance shall not be affected.

SEC. 4013. DURATION.

43 USC 390b note.

This subtitle shall expire on the date that is 5 years after the date of its enactment, with the exception of—

(1) section 4004, which shall expire 10 years after the date of its enactment; and

(2) projects under construction in sections 4007, 4009(a), and 4009(c).

SEC. 4014. DEFINITIONS.

43 USC 390b note.

In this subtitle:

(1) ASSISTANT ADMINISTRATOR.—The term "Assistant Administrator" means the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration.

(2) CENTRAL VALLEY PROJECT.—The term "Central Valley Project" has the meaning given the term in section 3403 of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4707).

(3) COMMISSIONER.—The term "Commissioner" means the Commissioner of Reclamation.

(4) DELTA.—The term "Delta" means the Sacramento-San Joaquin Delta and the Suisun Marsh (as defined in section 12220 of the California Water Code and section 29101 of the California Public Resources Code (as in effect on the date of enactment of this Act)).

(5) DELTA SMELT.—The term "Delta smelt" means the fish species with the scientific name Hypomesus transpacificus.

(6) DIRECTOR.—The term "Director" means the Director of the United States Fish and Wildlife Service.

(7) LISTED FISH SPECIES.—The term "listed fish species" means—

(A) any natural origin steelhead, natural origin genetic spring run Chinook, or genetic winter run Chinook salmon (including any hatchery steelhead or salmon population within the evolutionary significant unit or a distinct population segment); and

(B) Delta smelt.

(8) RECLAMATION STATE.—The term "Reclamation State" means any of the States of—

(A) Arizona;
(B) California;
(C) Colorado;
(D) Idaho;
(E) Kansas;
(F) Montana;
(G) Nebraska;
(H) Nevada;
(I) New Mexico;
(J) North Dakota;
(K) Oklahoma;
(L) Oregon;
(M) South Dakota;
(N) Texas;
(O) Utah;
(P) Washington; and
(Q) Wyoming.

(9) SALMONID BIOLOGICAL OPINION.—

(A) IN GENERAL.—The term "salmonid biological opinion" means the biological and conference opinion of the National Marine Fisheries Service dated June 4, 2009, regarding the long-term operation of the Central Valley Project and the State Water Project, and successor biological opinions.

(B) INCLUSIONS.—The term "salmonid biological opinion" includes the operative incidental take statement of the opinion described in subparagraph (A).

(10) SMELT BIOLOGICAL OPINION.—

(A) IN GENERAL.—The term "smelt biological opinion" means the biological opinion dated December 15, 2008, regarding the coordinated operation of the Central Valley Project and the State Water Project, and successor biological opinions.

(B) INCLUSIONS.—The term "smelt biological opinion" includes the operative incidental take statement of the opinion described in subparagraph (A).

(11) STATE WATER PROJECT.—The term "State Water Project" means the water project described in chapter 5 of part 3 of division 6 of the California Water Code (sections 11550 et seq.) (as in effect on the date of enactment of this Act) and operated by the California Department of Water Resources.

TITLE IV—OTHER MATTERS

SEC. 5001. CONGRESSIONAL NOTIFICATION REQUIREMENTS.

(a) IN GENERAL.—Subchapter I of chapter 3 of title 49, United States Code, is amended by adding at the end the following:

49 USC 311.

"§ 311. Congressional notification requirements

"(a) IN GENERAL.—Except as provided in subsection (b) or as expressly provided in another provision of law, the Secretary of Transportation shall provide to the appropriate committees of Congress notice of an announcement concerning a covered project at least 3 full business days before the announcement is made by the Department.

"(b) EMERGENCY PROGRAM.—With respect to an allocation of funds under section 125 of title 23, the Secretary shall provide to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate notice of the allocation—

"(1) at least 3 full business days before the issuance of the allocation; or

"(2) concurrently with the issuance of the allocation, if the allocation is made using the quick release process of the Department (or any successor process).

"(c) DEFINITIONS.—In this section, the following definitions apply:

"(1) APPROPRIATE COMMITTEES OF CONGRESS.—The term 'appropriate committees of Congress' means—

"(A) the Committee on Transportation and Infrastructure of the House of Representatives; and

"(B) the Committee on Environment and Public Works, the Committee on Commerce, Science, and Transportation,

and the Committee on Banking, Housing, and Urban Affairs of the Senate.

"(2) COVERED PROJECT.—The term 'covered project' means a project competitively selected by the Department to receive a discretionary grant award, letter of intent, loan commitment, loan guarantee commitment, or line of credit commitment in an amount equal to or greater than $750,000.

"(3) DEPARTMENT.—The term 'Department' means the Department of Transportation, including the modal administrations of the Department.".

(b) CLERICAL AMENDMENT.—The analysis for chapter 3 of title 49, United States Code, is amended by inserting after the item relating to section 310 the following:

49 USC prec. 301.

"311. Congressional notification requirements.".

SEC. 5002. REAUTHORIZATION OF DENALI COMMISSION.

(a) ADMINISTRATION.—Section 303 of the Denali Commission Act of 1998 (42 U.S.C. 3121 note; Public Law 105–277) is amended—

(1) in subsection (c)—

(A) in the first sentence by striking "The Federal Cochairperson" and inserting the following:

"(1) TERM OF FEDERAL COCHAIRPERSON.—The Federal Cochairperson";

(B) in the second sentence by striking "All other members" and inserting the following:

"(3) TERM OF ALL OTHER MEMBERS.—All other members";

(C) in the third sentence by striking "Any vacancy" and inserting the following:

"(4) VACANCIES.—Except as provided in paragraph (2), any vacancy"; and

(D) by inserting before paragraph (3) (as designated by subparagraph (B)) the following:

"(2) INTERIM FEDERAL COCHAIRPERSON.—In the event of a vacancy for any reason in the position of Federal Cochairperson, the Secretary may appoint an Interim Federal Cochairperson, who shall have all the authority of the Federal Cochairperson, to serve until such time as the vacancy in the position of Federal Cochairperson is filled in accordance with subsection (b)(2)).."; and

(2) by adding at the end the following:

"(f) NO FEDERAL EMPLOYEE STATUS.—No member of the Commission, other than the Federal Cochairperson, shall be considered to be a Federal employee for any purpose.

"(g) CONFLICTS OF INTEREST.—

"(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), no member of the Commission (referred to in this subsection as a 'member') shall participate personally or substantially, through recommendation, the rendering of advice, investigation, or otherwise, in any proceeding, application, request for a ruling or other determination, contract claim, controversy, or other matter in which, to the knowledge of the member, 1 or more of the following has a direct financial interest:

"(A) The member.

"(B) The spouse, minor child, or partner of the member.

"(C) An organization described in subparagraph (B), (C), (D), (E), or (F) of subsection (b)(1) for which the member

is serving as an officer, director, trustee, partner, or employee.

"(D) Any individual, person, or organization with which the member is negotiating or has any arrangement concerning prospective employment.

"(2) DISCLOSURE.—Paragraph (1) shall not apply if the member—

"(A) immediately advises the designated agency ethics official for the Commission of the nature and circumstances of the matter presenting a potential conflict of interest;

"(B) makes full disclosure of the financial interest; and

"(C) before the proceeding concerning the matter presenting the conflict of interest, receives a written determination by the designated agency ethics official for the Commission that the interest is not so substantial as to be likely to affect the integrity of the services that the Commission may expect from the member. The written determination shall specify the rationale and any evidence or support for the decision, identify steps, if any, that should be taken to mitigate any conflict of interest, and be available to the public.

"(3) ANNUAL DISCLOSURES.—Once each calendar year, each member shall make full disclosure of financial interests, in a manner to be determined by the designated agency ethics official for the Commission.

"(4) TRAINING.—Once each calendar year, each member shall undergo disclosure of financial interests training, as prescribed by the designated agency ethics official for the Commission.

"(5) CLARIFICATION.—A member of the Commission may continue to participate personally or substantially, through decision, approval, or disapproval on the focus of applications to be considered but not on individual applications where a conflict of interest exists.

"(6) VIOLATION.—Any person that violates this subsection shall be fined not more than $10,000, imprisoned for not more than 2 years, or both.".

(b) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—Section 310 of the Denali Commission Act of 1998 (42 U.S.C. 3121 note; Public Law 105–277) (as redesignated by section 1960(1) of SAFETEA–LU (Public Law 109–59; 119 Stat. 1516)) is amended, in subsection (a), by striking "under section 4 under this Act" and all that follows through "2008" and inserting "under section 304, $15,000,000 for each of fiscal years 2017 through 2021.".

(2) CLERICAL AMENDMENT.—Section 310 of the Denali Commission Act of 1998 (42 U.S.C. 3121 note; Public Law 105–277) (as redesignated by section 1960(1) of SAFETEA–LU (Public Law 109–59; 119 Stat. 1516)) is redesignated as section 312.

SEC. 5003. RECREATIONAL ACCESS FOR FLOATING CABINS AT TVA RESERVOIRS.

The Tennessee Valley Authority Act of 1933 is amended by inserting after section 9a (16 U.S.C. 831h-1) the following:

"SEC. 9b. RECREATIONAL ACCESS. 16 USC 831h–3.

"(a) DEFINITION OF FLOATING CABIN.—In this section, the term 'floating cabin' means a watercraft or other floating structure—

"(1) primarily designed and used for human habitation or occupation; and

"(2) not primarily designed or used for navigation or transportation on water.

"(b) RECREATIONAL ACCESS.—The Board may allow the use of a floating cabin if—

"(1) the floating cabin is maintained by the owner to reasonable health, safety, and environmental standards, as required by the Board;

"(2) the Corporation has authorized the use of recreational vessels on the waters; and

"(3) the floating cabin was located on waters under the jurisdiction of the Corporation as of the date of enactment of this section.

"(c) FEES.—The Board may levy fees on the owner of a floating cabin on waters under the jurisdiction of the Corporation for the purpose of ensuring compliance with subsection (b) if the fees are necessary and reasonable for such purpose.

"(d) CONTINUED RECREATIONAL USE.—

"(1) IN GENERAL.—With respect to a floating cabin located on waters under the jurisdiction of the Corporation on the date of enactment of this section, the Board—

"(A) may not require the removal of the floating cabin—

"(i) in the case of a floating cabin that was granted a permit by the Corporation before the date of enactment of this section, for a period of 15 years beginning on such date of enactment; and

"(ii) in the case of a floating cabin not granted a permit by the Corporation before the date of enactment of this section, for a period of 5 years beginning on such date of enactment; and

"(B) shall approve and allow the use of the floating cabin on waters under the jurisdiction of the Corporation at such time and for such duration as—

"(i) the floating cabin meets the requirements of subsection (b); and

"(ii) the owner of the floating cabin has paid any fee assessed pursuant to subsection (c).

"(2) SAVINGS PROVISIONS.—

"(A) Nothing in this subsection restricts the ability of the Corporation to enforce reasonable health, safety, or environmental standards.

"(B) This section applies only to floating cabins located on waters under the jurisdiction of the Corporation.

"(e) NEW CONSTRUCTION.—The Corporation may establish regulations to prevent the construction of new floating cabins.".

SEC. 5004. GOLD KING MINE SPILL RECOVERY.

(a) DEFINITIONS.—In this section:

(1) ADMINISTRATOR.—The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) CLAIMANT.—The term "claimant" means a State, Indian tribe, or local government that submits a claim under subsection (c).

(3) GOLD KING MINE RELEASE.—The term "Gold King Mine release" means the discharge on August 5, 2015, of approximately 3,000,000 gallons of contaminated water from the Gold King Mine north of Silverton, Colorado, into Cement Creek that occurred while contractors of the Environmental Protection Agency were conducting an investigation of the Gold King Mine to assess mine conditions.

(4) NATIONAL CONTINGENCY PLAN.—The term "National Contingency Plan" means the National Contingency Plan prepared and published under part 300 of title 40, Code of Federal Regulations (or successor regulations).

(5) RESPONSE.—The term "response" has the meaning given the term in section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601).

(b) SENSE OF CONGRESS.—It is the sense of Congress that the Administrator should receive and process, as expeditiously as possible, claims under chapter 171 of title 28, United States Code (commonly known as the "Federal Tort Claims Act") for any injury arising out of the Gold King Mine release.

(c) GOLD KING MINE RELEASE CLAIMS PURSUANT TO COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT.—

(1) IN GENERAL.—The Administrator shall, consistent with the National Contingency Plan, receive and process under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.), and pay from appropriations made available to the Administrator to carry out such Act, any claim made by a State, Indian tribe, or local government for eligible response costs relating to the Gold King Mine release.

(2) ELIGIBLE RESPONSE COSTS.—

(A) IN GENERAL.—Response costs incurred between August 5, 2015, and September 9, 2016, are eligible for payment by the Administrator under this subsection, without prior approval by the Administrator, if the response costs are consistent with the National Contingency Plan.

(B) PRIOR APPROVAL REQUIRED.—Response costs incurred after September 9, 2016, are eligible for payment by the Administrator under this subsection if—

(i) the Administrator approves the response costs under section 111(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611(a)(2)); and

(ii) the response costs are consistent with the National Contingency Plan.

(3) TIMING.—

(A) IN GENERAL.—Not later than 90 days after the date of enactment of this Act, the Administrator shall make a decision on, and pay, any eligible response costs submitted to the Administrator before such date of enactment.

(B) SUBSEQUENTLY FILED CLAIMS.—Not later than 90 days after the date on which a claim is submitted to the Administrator, the Administrator shall make a decision on, and pay, any eligible response costs.

(C) DEADLINE.—All claims under this subsection shall be submitted to the Administrator not later than 180 days after the date of enactment of this Act.

(D) NOTIFICATION.—Not later than 30 days after the date on which the Administrator makes a decision under subparagraph (A) or (B), the Administrator shall notify the claimant of the decision.

(d) WATER QUALITY PROGRAM.—

(1) IN GENERAL.—In response to the Gold King Mine release, the Administrator, in conjunction with affected States, Indian tribes, and local governments, shall, subject to the availability of appropriations, develop and implement a program for long-term water quality monitoring of rivers contaminated by the Gold King Mine release.

(2) REQUIREMENTS.—In carrying out the program described in paragraph (1), the Administrator, in conjunction with affected States, Indian tribes, and local governments, shall—

(A) collect water quality samples and sediment data;

(B) provide the public with a means of viewing the water quality sample results and sediment data referred to in subparagraph (A) by, at a minimum, posting the information on the website of the Administrator;

(C) take any other reasonable measure necessary to assist affected States, Indian tribes, and local governments with long-term water monitoring; and

(D) carry out additional program activities related to long-term water quality monitoring that the Administrator determines to be necessary.

(3) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Administrator $4,000,000.00 for each of fiscal years 2017 through 2021 to carry out this subsection, including the reimbursement of affected States, Indian tribes, and local governments for the costs of long-term water quality monitoring of any river contaminated by the Gold King Mine release.

(e) EXISTING STATE AND TRIBAL LAW.—Nothing in this section affects the jurisdiction or authority of any department, agency, or officer of any State government or any Indian tribe.

(f) SAVINGS CLAUSE.—Nothing in this section affects any right of any State, Indian tribe, or other person to bring a claim against the United States for response costs or natural resources damages pursuant to section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607).

SEC. 5005. GREAT LAKES RESTORATION INITIATIVE.

Section 118(c)(7) of the Federal Water Pollution Control Act (33 U.S.C. 1268(c)(7)) is amended—

(1) by striking subparagraphs (B) and (C) and inserting the following:

"(B) FOCUS AREAS.—In carrying out the Initiative, the Administrator shall prioritize programs and projects, to be carried out in coordination with non-Federal partners, that address the priority areas described in the Initiative Action Plan, including—

"(i) the remediation of toxic substances and areas of concern;

"(ii) the prevention and control of invasive species and the impacts of invasive species;

"(iii) the protection and restoration of nearshore health and the prevention and mitigation of nonpoint source pollution;

"(iv) habitat and wildlife protection and restoration, including wetlands restoration and preservation; and

"(v) accountability, monitoring, evaluation, communication, and partnership activities.

"(C) PROJECTS.—

"(i) IN GENERAL.—In carrying out the Initiative, the Administrator shall collaborate with other Federal partners, including the Great Lakes Interagency Task Force established by Executive Order No. 13340 (69 Fed. Reg. 29043), to select the best combination of programs and projects for Great Lakes protection and restoration using appropriate principles and criteria, including whether a program or project provides—

"(I) the ability to achieve strategic and measurable environmental outcomes that implement the Initiative Action Plan and the Great Lakes Water Quality Agreement;

"(II) the feasibility of—

"(aa) prompt implementation;

"(bb) timely achievement of results; and

"(cc) resource leveraging; and

"(III) the opportunity to improve interagency, intergovernmental, and interorganizational coordination and collaboration to reduce duplication and streamline efforts.

"(ii) OUTREACH.—In selecting the best combination of programs and projects for Great Lakes protection and restoration under clause (i), the Administrator shall consult with the Great Lakes States and Indian tribes and solicit input from other non-Federal stakeholders.

"(iii) HARMFUL ALGAL BLOOM COORDINATOR.—The Administrator shall designate a point person from an appropriate Federal partner to coordinate, with Federal partners and Great Lakes States, Indian tribes, and other non-Federal stakeholders, projects and activities under the Initiative involving harmful algal blooms in the Great Lakes.";

(2) in subparagraph (D)—

(A) by striking clause (i) and inserting the following:

"(i) IN GENERAL.—Subject to subparagraph (J)(ii), funds made available to carry out the Initiative shall be used to strategically implement—

"(I) Federal projects;

"(II) projects carried out in coordination with States, Indian tribes, municipalities, institutions of higher education, and other organizations; and

"(III) operations and activities of the Program Office, including remediation of sediment contamination in areas of concern.";

(B) in clause (ii)(I), by striking "(G)(i)" and inserting "(J)(i)"; and

(C) by inserting after clause (ii) the following:

"(iii) AGREEMENTS WITH NON-FEDERAL ENTITIES.—

"(I) IN GENERAL.—The Administrator, or the head of any other Federal department or agency receiving funds under clause (ii)(I), may make a grant to, or otherwise enter into an agreement with, a qualified non-Federal entity, as determined by the Administrator or the applicable head of the other Federal department or agency receiving funds, for planning, research, monitoring, outreach, or implementation of a project selected under subparagraph (C), to support the Initiative Action Plan or the Great Lakes Water Quality Agreement.

"(II) QUALIFIED NON-FEDERAL ENTITY.—For purposes of this clause, a qualified non-Federal entity may include a governmental entity, nonprofit organization, institution, or individual."; and

(3) by striking subparagraphs (E) through (G) and inserting the following:

"(E) SCOPE.—

"(i) IN GENERAL.—Projects may be carried out under the Initiative on multiple levels, including—

"(I) locally;

"(II) Great Lakes-wide; or

"(III) Great Lakes basin-wide.

"(ii) LIMITATION.—No funds made available to carry out the Initiative may be used for any water infrastructure activity (other than a green infrastructure project that improves habitat and other ecosystem functions in the Great Lakes) for which financial assistance is received—

"(I) from a State water pollution control revolving fund established under title VI;

"(II) from a State drinking water revolving loan fund established under section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j–12); or

"(III) pursuant to the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3901 et seq.).

"(F) ACTIVITIES BY OTHER FEDERAL AGENCIES.—Each relevant Federal department or agency shall, to the maximum extent practicable—

"(i) maintain the base level of funding for the Great Lakes activities of that department or agency without regard to funding under the Initiative; and

"(ii) identify new activities and projects to support the environmental goals of the Initiative.

"(G) REVISION OF INITIATIVE ACTION PLAN.—

"(i) IN GENERAL.—Not less often than once every 5 years, the Administrator, in conjunction with the Great Lakes Interagency Task Force, shall review, and revise as appropriate, the Initiative Action Plan to guide the activities of the Initiative in addressing the restoration and protection of the Great Lakes system.

"(ii) OUTREACH.—In reviewing and revising the Initiative Action Plan under clause (i), the Administrator shall consult with the Great Lakes States and Indian tribes and solicit input from other non-Federal stakeholders.

"(H) MONITORING AND REPORTING.—The Administrator shall—

"(i) establish and maintain a process for monitoring and periodically reporting to the public on the progress made in implementing the Initiative Action Plan;

"(ii) make information about each project carried out under the Initiative Action Plan available on a public website; and

"(iii) provide to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate a yearly detailed description of the progress of the Initiative and amounts transferred to participating Federal departments and agencies under subparagraph (D)(ii).

"(I) INITIATIVE ACTION PLAN DEFINED.—In this paragraph, the term 'Initiative Action Plan' means the comprehensive, multiyear action plan for the restoration of the Great Lakes, first developed pursuant to the Joint Explanatory Statement of the Conference Report accompanying the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (Public Law 111–88).

"(J) FUNDING.—

"(i) IN GENERAL.—There is authorized to be appropriated to carry out this paragraph $300,000,000 for each of fiscal years 2017 through 2021.

"(ii) LIMITATION.—Nothing in this paragraph creates, expands, or amends the authority of the Administrator to implement programs or projects under—

"(I) this section;

"(II) the Initiative Action Plan; or

"(III) the Great Lakes Water Quality Agreement.".

SEC. 5006. REHABILITATION OF HIGH HAZARD POTENTIAL DAMS.

(a) DEFINITIONS.—Section 2 of the National Dam Safety Program Act (33 U.S.C. 467) is amended—

(1) by redesignating paragraphs (4), (5), (6), (7), (8), (9), (10), (11), (12), and (13) as paragraphs (5), (6), (7), (8), (9), (11), (13), (14), (15), and (16), respectively;

(2) by inserting after paragraph (3) the following:

"(4) ELIGIBLE HIGH HAZARD POTENTIAL DAM.—

"(A) IN GENERAL.—The term 'eligible high hazard potential dam' means a non-Federal dam that—

"(i) is located in a State with a State dam safety program;

"(ii) is classified as 'high hazard potential' by the State dam safety agency in the State in which the dam is located;

"(iii) has an emergency action plan approved by the relevant State dam safety agency; and

"(iv) the State in which the dam is located determines—

"(I) fails to meet minimum dam safety standards of the State; and

"(II) poses an unacceptable risk to the public.

"(B) EXCLUSION.—The term 'eligible high hazard potential dam' does not include—

"(i) a licensed hydroelectric dam; or

"(ii) a dam built under the authority of the Secretary of Agriculture.";

(3) by inserting after paragraph (9) (as redesignated by paragraph (1) of this subsection) the following:

"(10) NON-FEDERAL SPONSOR.—The term 'non-Federal sponsor', in the case of a project receiving assistance under section 8A, includes—

"(A) a governmental organization; and

"(B) a nonprofit organization."; and

(4) by inserting after paragraph (11) (as redesignated by paragraph (1) of this subsection) the following:

"(12) REHABILITATION.—The term 'rehabilitation' means the repair, replacement, reconstruction, or removal of a dam that is carried out to meet applicable State dam safety and security standards.".

(b) PROGRAM FOR REHABILITATION OF HIGH HAZARD POTENTIAL DAMS.—The National Dam Safety Program Act is amended by inserting after section 8 (33 U.S.C. 467f) the following:

"SEC. 8A. REHABILITATION OF HIGH HAZARD POTENTIAL DAMS. 33 USC 467f–2.

"(a) ESTABLISHMENT OF PROGRAM.—The Administrator shall establish, within FEMA, a program to provide technical, planning, design, and construction assistance in the form of grants to non-Federal sponsors for rehabilitation of eligible high hazard potential dams.

"(b) ELIGIBLE ACTIVITIES.—A grant awarded under this section for a project may be used for—

"(1) repair;

"(2) removal; or

"(3) any other structural or nonstructural measures to rehabilitate an eligible high hazard potential dam.

"(c) AWARD OF GRANTS.—

"(1) APPLICATION.—

"(A) IN GENERAL.—A non-Federal sponsor interested in receiving a grant under this section may submit to the Administrator an application for the grant.

"(B) REQUIREMENTS.—An application submitted to the Administrator under this section shall be submitted at such time, be in such form, and contain such information as the Administrator may prescribe by regulation.

"(2) GRANT.—

"(A) IN GENERAL.—The Administrator may make a grant in accordance with this section for rehabilitation of an eligible high hazard potential dam to a non-Federal sponsor that submits an application for the grant in accordance with the regulations prescribed by the Administrator.

"(B) PROJECT GRANT AGREEMENT.—The Administrator shall enter into a project grant agreement with the non-

Federal sponsor to establish the terms of the grant and the project, including the amount of the grant.

"(C) GRANT ASSURANCE.—As part of a project grant agreement under subparagraph (B), the Administrator shall require the non-Federal sponsor to provide an assurance, with respect to the dam to be rehabilitated under the project, that the owner of the dam has developed and will carry out a plan for maintenance of the dam during the expected life of the dam.

"(D) LIMITATION.—A grant provided under this section shall not exceed the lesser of—

"(i) 12.5 percent of the total amount of funds made available to carry out this section; or

"(ii) $7,500,000.

"(d) REQUIREMENTS.—

"(1) APPROVAL.—A grant awarded under this section for a project shall be approved by the relevant State dam safety agency.

"(2) NON-FEDERAL SPONSOR REQUIREMENTS.—To receive a grant under this section, the non-Federal sponsor shall—

"(A) participate in, and comply with, all applicable Federal flood insurance programs;

"(B) have in place a hazard mitigation plan that—

"(i) includes all dam risks; and

"(ii) complies with the Disaster Mitigation Act of 2000 (Public Law 106–390; 114 Stat. 1552);

"(C) commit to provide operation and maintenance of the project for the 50-year period following completion of rehabilitation;

"(D) comply with such minimum eligibility requirements as the Administrator may establish to ensure that each owner and operator of a dam under a participating State dam safety program and that receives assistance under this section—

"(i) acts in accordance with the State dam safety program; and

"(ii) carries out activities relating to the public in the area around the dam in accordance with the hazard mitigation plan described in subparagraph (B); and

"(E) comply with section 611(j)(9) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5196(j)(9)) (as in effect on the date of enactment of this section) with respect to projects receiving assistance under this section in the same manner as recipients are required to comply in order to receive financial contributions from the Administrator for emergency preparedness purposes.

"(e) FLOODPLAIN MANAGEMENT PLANS.—

"(1) IN GENERAL.—As a condition of receipt of assistance under this section, the non-Federal sponsor shall demonstrate that a floodplain management plan to reduce the impacts of future flood events in the area protected by the project—

"(A) is in place; or

"(B) will be—

"(i) developed not later than 1 year after the date of execution of a project agreement for assistance under this section; and

"(ii) implemented not later than 1 year after the date of completion of construction of the project.

"(2) INCLUSIONS.—A plan under paragraph (1) shall address—

"(A) potential measures, practices, and policies to reduce loss of life, injuries, damage to property and facilities, public expenditures, and other adverse impacts of flooding in the area protected by the project;

"(B) plans for flood fighting and evacuation; and

"(C) public education and awareness of flood risks.

"(3) TECHNICAL SUPPORT.—The Administrator may provide technical support for the development and implementation of floodplain management plans prepared under this subsection.

"(f) PRIORITY SYSTEM.—The Administrator, in consultation with the Board, shall develop a risk-based priority system for use in identifying eligible high hazard potential dams for which grants may be made under this section.

"(g) FUNDING.—

"(1) COST SHARING.—

"(A) IN GENERAL.—Any assistance provided under this section for a project shall be subject to a non-Federal cost-sharing requirement of not less than 35 percent.

"(B) IN-KIND CONTRIBUTIONS.—The non-Federal share under subparagraph (A) may be provided in the form of in-kind contributions.

"(2) ALLOCATION OF FUNDS.—The total amount of funds made available to carry out this section for each fiscal year shall be distributed as follows:

"(A) EQUAL DISTRIBUTION.—[1]Ú shall be distributed equally among the States in which the projects for which applications are submitted under subsection (c)(1) are located.

"(B) NEED-BASED.—[2]Ú shall be distributed among the States in which the projects for which applications are submitted under subsection (c)(1) are located based on the proportion that—

"(i) the number of eligible high hazard potential dams in the State; bears to

"(ii) the number of eligible high hazard potential dams in all such States.

"(h) USE OF FUNDS.—None of the funds provided in the form of a grant or otherwise made available under this section shall be used—

"(1) to rehabilitate a Federal dam;

"(2) to perform routine operation or maintenance of a dam;

"(3) to modify a dam to produce hydroelectric power;

"(4) to increase water supply storage capacity; or

"(5) to make any other modification to a dam that does not also improve the safety of the dam.

"(i) CONTRACTUAL REQUIREMENTS.—

"(1) IN GENERAL.—Subject to paragraph (2), as a condition on the receipt of a grant under this section of an amount greater than $1,000,000, a non-Federal sponsor that receives the grant shall require that each contract and subcontract

for program management, construction management, planning studies, feasibility studies, architectural services, preliminary engineering, design, engineering, surveying, mapping, and related services entered into using funds from the grant be awarded in the same manner as a contract for architectural and engineering services is awarded under—

"(A) chapter 11 of title 40, United States Code; or

"(B) an equivalent qualifications-based requirement prescribed by the relevant State.

"(2) NO PROPRIETARY INTEREST.—A contract awarded in accordance with paragraph (1) shall not be considered to confer a proprietary interest upon the United States.

"(j) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section—

"(1) $10,000,000 for fiscal years 2017 and 2018;

"(2) $25,000,000 for fiscal year 2019;

"(3) $40,000,000 for fiscal year 2020; and

"(4) $60,000,000 for each of fiscal years 2021 through 2026.".

33 USC 467f–2 note.

(c) RULEMAKING.—

(1) PROPOSED RULEMAKING.—Not later than 90 days after the date of enactment of this Act, the Administrator of the Federal Emergency Management Agency shall issue a notice of proposed rulemaking regarding applications for grants of assistance under the amendments made by subsection (b) to the National Dam Safety Program Act (33 U.S.C. 467 et seq.).

(2) FINAL RULE.—Not later than 180 days after the date of enactment of this Act, the Administrator of the Federal Emergency Management Agency shall promulgate a final rule regarding the amendments described in paragraph (1).

SEC. 5007. CHESAPEAKE BAY GRASS SURVEY.

Section 117(i) of the Federal Water Pollution Control Act (33 U.S.C. 1267(i)) is amended by adding at the end the following:

"(3) ANNUAL SURVEY.—The Administrator shall carry out an annual survey of sea grasses in the Chesapeake Bay.".

SEC. 5008. WATER INFRASTRUCTURE FINANCE AND INNOVATION.

(a) AUTHORITY TO PROVIDE ASSISTANCE.—Section 5023(b)(2) of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3902(b)(2)) is amended by striking "carry out" and inserting "provide financial assistance to carry out".

(b) PROJECTS ELIGIBLE FOR ASSISTANCE.—

(1) IN GENERAL.—Section 5026 of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3905) is amended—

(A) in paragraph (6)—

(i) by striking "desalination project" and inserting "desalination project, including chloride control"; and

(ii) by striking "or a water recycling project" and inserting "a water recycling project, or a project to provide alternative water supplies to reduce aquifer depletion";

(B) by redesignating paragraphs (7), (8), and (9) as paragraphs (8), (9), and (10), respectively;

(C) by inserting after paragraph (6) the following:

"(7) A project to prevent, reduce, or mitigate the effects of drought, including projects that enhance the resilience of drought-stricken watersheds."; and

(D) in paragraph (10) (as redesignated by subparagraph (B)), by striking "or (7)" and inserting "(7), or (8)".

(2) CONFORMING AMENDMENTS.—

(A) Section 5023(b) of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3902(b)) is amended—

(i) in paragraph (2) by striking "and (8)" and inserting "(7), and (9)"; and

(ii) in paragraph (3) by striking "paragraph (7) or (9)" and inserting "paragraph (8) or (10)".

(B) Section 5024(b) of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3903(b)) is amended by striking "paragraph (8) or (9)" and inserting "paragraph (9) or (10)".

(C) Section 5027(3) of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3906(3)) is amended by striking "section 5026(7)" and inserting "section 5026(8)".

(D) Section 5028 of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3907) is amended—

(i) in subsection (a)(1)(E)—

(I) by striking "section 5026(9)" and inserting "section 5026(10)"; and

(II) by striking "section 5026(8)" and inserting "section 5026(9)"; and

(ii) in subsection (b)(3) by striking "section 5026(8)" and inserting "section 5026(9)".

(c) TERMS AND CONDITIONS.—Section 5029(b) of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3908(b)) is amended—

(1) in paragraph (7)—

(A) by striking "The Secretary" and inserting the following:

"(A) IN GENERAL.—Except as provided in subparagraph (B), the Secretary"; and

(B) by adding at the end the following:

"(B) FINANCING FEES.—On request of an eligible entity, the Secretary or the Administrator, as applicable, shall allow the fees under subparagraph (A) to be financed as part of the loan."; and

(2) by adding at the end the following:

"(10) CREDIT.—Any eligible project costs incurred and the value of any integral in-kind contributions made before receipt of assistance under this subtitle shall be credited toward the 51 percent of project costs to be provided by sources of funding other than a secured loan under this subtitle (as described in paragraph (2)(A))."

(d) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) appropriations made available to carry out the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3901 et seq.) should be in addition to robust funding for the State water pollution control revolving funds established under title VI of the Federal Water Pollution Control Act (33 U.S.C. 1381 et seq.) and State drinking water treatment revolving

loan funds established under section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j–12); and

(2) the appropriations made available for the funds referred to in paragraph (1) should not decrease for any fiscal year.

SEC. 5009. REPORT ON GROUNDWATER CONTAMINATION.

(a) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, and annually thereafter for the next 4 years, the Secretary of the Navy shall submit a report to Congress on the groundwater contamination from the site that includes—

(1) a description of the status of the groundwater contaminants that are leaving the site and migrating to a location within a 10-mile radius of the site, including—

(A) detailed mapping of the movement of the plume over time; and

(B) projected migration rates of the plume;

(2) an analysis of the current and future impact of the movement of the plume on drinking water facilities; and

(3) a comprehensive strategy to prevent the groundwater contaminants from the site from contaminating drinking water wells that, as of the date of the submission of the report, have not been affected by the migration of the plume.

(b) DEFINITIONS.—In this section, the following definitions apply:

(1) COMPREHENSIVE STRATEGY.—The term "comprehensive strategy" means a plan for—

(A) the remediation of the plume under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.); or

(B) corrective action under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(2) GROUNDWATER.—The term "groundwater" means water in a saturated zone or stratum beneath the surface of land or water.

(3) PLUME.—The term "plume" means any hazardous waste (as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903)) or hazardous substance (as defined in section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601)) found in the groundwater supply.

(4) SITE.—The term "site" means the site located at 830 South Oyster Bay Road, Bethpage, New York, 11714 (Environmental Protection Agency identification number NYD002047967).

SEC. 5010. COLUMBIA RIVER BASIN RESTORATION.

Title I of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) is amended by adding at the end the following:

33 USC 1275.

"SEC. 123. COLUMBIA RIVER BASIN RESTORATION.

"(a) DEFINITIONS.—In this section, the following definitions apply:

"(1) COLUMBIA RIVER BASIN.—The term 'Columbia River Basin' means the entire United States portion of the Columbia River watershed.

"(2) ESTUARY PARTNERSHIP.—The term 'Estuary Partnership' means the Lower Columbia Estuary Partnership, an entity

created by the States of Oregon and Washington and the Environmental Protection Agency under section 320.

"(3) ESTUARY PLAN.—

"(A) IN GENERAL.—The term 'Estuary Plan' means the Estuary Partnership Comprehensive Conservation and Management Plan adopted by the Environmental Protection Agency and the Governors of Oregon and Washington on October 20, 1999, under section 320.

"(B) INCLUSION.—The term 'Estuary Plan' includes any amendments to the plan.

"(4) LOWER COLUMBIA RIVER ESTUARY.—The term 'Lower Columbia River Estuary' means the mainstem Columbia River from the Bonneville Dam to the Pacific Ocean and tidally influenced portions of tributaries to the Columbia River in that region.

"(5) MIDDLE AND UPPER COLUMBIA RIVER BASIN.—The term 'Middle and Upper Columbia River Basin' means the region consisting of the United States portion of the Columbia River Basin above Bonneville Dam.

"(6) PROGRAM.—The term 'Program' means the Columbia River Basin Restoration Program established under subsection (b)(1)(A).

"(b) COLUMBIA RIVER BASIN RESTORATION PROGRAM.—

"(1) ESTABLISHMENT.—

"(A) IN GENERAL.—The Administrator shall establish within the Environmental Protection Agency a Columbia River Basin Restoration Program.

"(B) EFFECT.—

"(i) The establishment of the Program does not modify any legal or regulatory authority or program in effect as of the date of enactment of this section, including the roles of Federal agencies in the Columbia River Basin.

"(ii) This section does not create any new regulatory authority.

"(2) SCOPE OF PROGRAM.—The Program shall consist of a collaborative stakeholder-based program for environmental protection and restoration activities throughout the Columbia River Basin.

"(3) DUTIES.—The Administrator shall—

"(A) assess trends in water quality, including trends that affect uses of the water of the Columbia River Basin;

"(B) collect, characterize, and assess data on water quality to identify possible causes of environmental problems; and

"(C) provide grants in accordance with subsection (d) for projects that assist in—

"(i) eliminating or reducing pollution;

"(ii) cleaning up contaminated sites;

"(iii) improving water quality;

"(iv) monitoring to evaluate trends;

"(v) reducing runoff;

"(vi) protecting habitat; or

"(vii) promoting citizen engagement or knowledge.

"(c) STAKEHOLDER WORKING GROUP.—

"(1) ESTABLISHMENT.—The Administrator shall establish a Columbia River Basin Restoration Working Group (referred to in this subsection as the 'Working Group').

"(2) MEMBERSHIP.—

"(A) IN GENERAL.—Membership in the Working Group shall be on a voluntary basis and any person invited by the Administrator under this subsection may decline membership.

"(B) INVITED REPRESENTATIVES.—The Administrator shall invite, at a minimum, representatives of—

"(i) each State located in whole or in part in the Columbia River Basin;

"(ii) the Governors of each State located in whole or in part in the Columbia River Basin;

"(iii) each federally recognized Indian tribe in the Columbia River Basin;

"(iv) local governments in the Columbia River Basin;

"(v) industries operating in the Columbia River Basin that affect or could affect water quality;

"(vi) electric, water, and wastewater utilities operating in the Columba River Basin;

"(vii) private landowners in the Columbia River Basin;

"(viii) soil and water conservation districts in the Columbia River Basin;

"(ix) nongovernmental organizations that have a presence in the Columbia River Basin;

"(x) the general public in the Columbia River Basin; and

"(xi) the Estuary Partnership.

"(3) GEOGRAPHIC REPRESENTATION.—The Working Group shall include representatives from—

"(A) each State located in whole or in part in the Columbia River Basin; and

"(B) each of the lower, middle, and upper basins of the Columbia River.

"(4) DUTIES AND RESPONSIBILITIES.—The Working Group shall—

"(A) recommend and prioritize projects and actions; and

"(B) review the progress and effectiveness of projects and actions implemented.

"(5) LOWER COLUMBIA RIVER ESTUARY.—

"(A) ESTUARY PARTNERSHIP.—The Estuary Partnership shall perform the duties and fulfill the responsibilities of the Working Group described in paragraph (4) as those duties and responsibilities relate to the Lower Columbia River Estuary for such time as the Estuary Partnership is the management conference for the Lower Columbia River National Estuary Program under section 320.

"(B) DESIGNATION.—If the Estuary Partnership ceases to be the management conference for the Lower Columbia River National Estuary Program under section 320, the Administrator may designate the new management conference to assume the duties and responsibilities of the Working Group described in paragraph (4) as those duties

and responsibilities relate to the Lower Columbia River Estuary.

"(C) INCORPORATION.—If the Estuary Partnership is removed from the National Estuary Program, the duties and responsibilities for the lower 146 miles of the Columbia River pursuant to this section shall be incorporated into the duties of the Working Group.

"(d) GRANTS.—

"(1) IN GENERAL.—The Administrator shall establish a voluntary, competitive Columbia River Basin program to provide grants to State governments, tribal governments, regional water pollution control agencies and entities, local government entities, nongovernmental entities, or soil and water conservation districts to develop or implement projects authorized under this section for the purpose of environmental protection and restoration activities throughout the Columbia River Basin.

"(2) FEDERAL SHARE.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the Federal share of the cost of any project or activity carried out using funds from a grant provided to any person (including a State, tribal, or local government or interstate or regional agency) under this subsection for a fiscal year—

"(i) shall not exceed 75 percent of the total cost of the project or activity; and

"(ii) shall be made on condition that the non-Federal share of such total cost shall be provided from non-Federal sources.

"(B) EXCEPTIONS.—With respect to cost-sharing for a grant provided under this subsection—

"(i) a tribal government may use Federal funds for the non-Federal share; and

"(ii) the Administrator may increase the Federal share under such circumstances as the Administrator determines to be appropriate.

"(3) ALLOCATION.—In making grants using funds appropriated to carry out this section, the Administrator shall—

"(A) provide not less than 25 percent of the funds to make grants for projects, programs, and studies in the Lower Columbia River Estuary;

"(B) provide not less than 25 percent of the funds to make grants for projects, programs, and studies in the Middle and Upper Columbia River Basin, including the Snake River Basin; and

"(C) retain not more than 5 percent of the funds for the Environmental Protection Agency for purposes of implementing this section.

"(4) REPORTING.—

"(A) IN GENERAL.—Each grant recipient under this subsection shall submit to the Administrator reports on progress being made in achieving the purposes of this section.

"(B) REQUIREMENTS.—The Administrator shall establish requirements and timelines for recipients of grants under this subsection to report on progress made in achieving the purposes of this section.

"(5) RELATIONSHIP TO OTHER FUNDING.—

"(A) IN GENERAL.—Nothing in this subsection limits the eligibility of the Estuary Partnership to receive funding under section 320(g).

"(B) LIMITATION.—None of the funds made available under this subsection may be used for the administration of a management conference under section 320.

"(e) ANNUAL BUDGET PLAN.—The President, as part of the annual budget submission of the President to Congress under section 1105(a) of title 31, United States Code, shall submit information regarding each Federal agency involved in protection and restoration of the Columbia River Basin, including an interagency crosscut budget that displays for each Federal agency—

"(1) the amounts obligated for the preceding fiscal year for protection and restoration projects, programs, and studies relating to the Columbia River Basin;

"(2) the estimated budget for the current fiscal year for protection and restoration projects, programs, and studies relating to the Columbia River Basin; and

"(3) the proposed budget for protection and restoration projects, programs, and studies relating to the Columbia River Basin.".

SEC. 5011. REGULATION OF ABOVEGROUND STORAGE AT FARMS.

Section 1049(c) of the Water Resources Reform and Development Act of 2014 (33 U.S.C. 1361 note; Public Law 113–121) is amended—

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and indenting appropriately;

(2) by striking the subsection designation and heading and all that follows through "subsection (b)," and inserting the following:

"(c) REGULATION OF ABOVEGROUND STORAGE AT FARMS.—

"(1) CALCULATION OF AGGREGATE ABOVEGROUND STORAGE CAPACITY.—For purposes of subsection (b),"; and

(3) by adding at the end the following:

"(2) CERTAIN FARM CONTAINERS.—Part 112 of title 40, Code of Federal Regulations (or successor regulations), shall not apply to the following containers located at a farm:

"(A) Containers on a separate parcel that have—

"(i) an individual capacity of not greater than 1,000 gallons; and

"(ii) an aggregate capacity of not greater than 2,500 gallons.

"(B) A container holding animal feed ingredients approved for use in livestock feed by the Food and Drug Administration.".

SEC. 5012. IRRIGATION DISTRICTS.

Section 603(i)(1) of the Federal Water Pollution Control Act (33 U.S.C. 1383) is amended—

(1) in the matter preceding subparagraph (A) by striking "to a municipality or intermunicipal, interstate, or State agency" and inserting "to an eligible recipient"; and

(2) in subparagraph (A), in the matter preceding clause (i), by inserting "in assistance to a municipality or intermunicipal, interstate, or State agency" before "to benefit".

SEC. 5013. ESTUARY RESTORATION.

(a) PARTICIPATION OF NON-FEDERAL INTERESTS.—Section 104(f) of the Estuary Restoration Act of 2000 (33 U.S.C. 2903(f)) is amended by adding at the end the following:

"(3) PROJECT AGREEMENTS.—For a project carried out under this title, the requirements of section 103(j)(1) of the Water Resources Development Act of 1986 (33 U.S.C. 2213(j)(1)) may be fulfilled by a nongovernmental organization serving as the non-Federal interest for the project pursuant to paragraph (2).".

(b) EXTENSION.—Section 109(a) of the Estuary Restoration Act of 2000 (33 U.S.C. 2908(a)) is amended by striking "2012" each place it appears and inserting "2021".

SEC. 5014. ENVIRONMENTAL BANKS.

The Coastal Wetlands Planning, Protection and Restoration Act (Public Law 101–646; 16 U.S.C. 3951 et seq.) is amended by adding at the end the following:

"SEC. 309. ENVIRONMENTAL BANKS. 16 USC 3957.

"(a) GUIDELINES.—Not later than 1 year after the date of enactment of the Water Resources Development Act of 2016, the Task Force shall, after public notice and opportunity for comment, issue guidelines for the use, maintenance, and oversight of environmental banks in Louisiana.

"(b) REQUIREMENTS.—The guidelines issued pursuant to subsection (a) shall—

"(1) set forth procedures for establishment and approval of environmental banks subject to the approval of the heads of the appropriate Federal agencies responsible for implementation of Federal environmental laws for which mitigation credits may be used;

"(2) establish criteria for siting of environmental banks that enhance the resilience of coastal resources to inundation and coastal erosion in high priority areas, as identified within Federal or State restoration plans, including the restoration of resources within the scope of a project authorized for construction;

"(3) establish criteria that ensure environmental banks secure adequate financial assurances and legally enforceable protection for the land or resources that generate the credits from environmental banks;

"(4) stipulate that credits from environmental banks may not be used for mitigation of impacts required under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1342) or the Endangered Species Act (16 U.S.C. 1531 et seq.) in an area where an existing mitigation bank approved pursuant to such laws within 5 years of enactment of the Water Resources Development Act of 2016 has credits available;

"(5) establish performance criteria for environmental banks; and

"(6) establish criteria and financial assurance for the operation and monitoring of environmental banks.

"(c) ENVIRONMENTAL BANK.—

"(1) DEFINITION OF ENVIRONMENTAL BANK.—In this section, the term 'environmental bank' means a project, project increment, or projects for purposes of restoring, creating, or

enhancing natural resources at a designated site to establish mitigation credits.

"(2) CREDITS.—Mitigation credits created from environmental banks approved pursuant to this section may be used to satisfy existing liability under Federal environmental laws.

"(d) SAVINGS CLAUSE.—

"(1) APPLICATION OF FEDERAL LAW.—Guidelines developed under this section and mitigation carried out through an environmental bank established pursuant to such guidelines shall comply with all applicable requirements of Federal law (including regulations), including—

"(A) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

"(B) the Endangered Species Act (16 U.S.C. 1531 et seq.);

"(C) the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.);

"(D) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

"(E) section 906 of the Water Resources Development Act of 1986 (33 U.S.C. 2283).

"(2) STATUTORY CONSTRUCTION.—Nothing in this section may be construed to affect—

"(A) any authority, regulatory determination, or legal obligation in effect the day before the date of enactment of the Water Resources Development Act of 2016; or

"(B) the obligations or requirements of any Federal environmental law.

"(e) SUNSET.—No new environmental bank may be created or approved pursuant to this section after the date that is 10 years after the date of enactment of this section.".

Approved December 16, 2016.

LEGISLATIVE HISTORY—S. 612:

CONGRESSIONAL RECORD:
Vol. 161 (2015): May 21, considered and passed Senate.
Vol. 162 (2016): Dec. 8, considered and passed House, amended. Senate considered concurring in House amendment.
Dec. 9, Senate concurred in House amendment.

DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2016):
Dec. 16, Presidential statement.

○

To: Susan Bodine[bodine.susan@epa.gov]
Cc: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]
Sent: Thur 9/26/2019 9:53:57 PM (UTC)

Ex. 5 AC, DP / Ex. 7(A)

Susan,

Ex. 5 AC, DP / Ex. 7(A)

For your consideration. (I'm cc'ing Rosemarie in case she has additional suggestions.)

Larry

Ex. 5 AC,DP, AWP / Ex. 7(A)

Ex. 5 AC,DP, AWP / Ex. 7(A)

Please let me know if you would like to discuss this further. I appreciate your consideration of this request.

To: Susan Bodine[bodine.susan@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]
Cc: Porter, Amy[Porter.Amy@epa.gov]; Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]
Sent: Sat 9/21/2019 7:46:50 PM (UTC)

Ex. 5 AC, DP / Ex. 7(A)

Susan and Rosemarie,

Larry Starfield
Principal Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. EPA
Washington, DC

(202) 564-2440 (office)
(202) 564-8179 (direct)
(202) 505-0961 (cell)

From: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Sent: Tuesday, September 17, 2019 10:45 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Porter, Amy <Porter.Amy@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Buterbaugh, Kristin <Buterbaugh.Kristin@epa.gov>
Ex. 5 AC/DP

Larry --

Ex. 5 AC, DP / Ex. 7(A)

Ex. 5 AC,DP, AWP / Ex. 7(A)

Ex. 5 AC,DP, AWP / Ex. 7(A)

Rosemarie

Rosemarie Kelley, Director

Office of Civil Enforcement

OECA

To: Bailey-Morton, Ethel[Bailey-Morton.Ethel@epa.gov]
From: Starfield.Lawrence@epa.gov[Starfield.Lawrence@epa.gov]
Sent: Thur 9/19/2019 10:16:51 PM (UTC)
Subject: Fwd: VTC
Summary of feedback for OECA HQ - Key Takeaways from VTCs.docx
ATT00001.htm

Please print and put it on my chair. Thanks.

Sent from my iPhone

Begin forwarded message:

From: "Mirza, Sabah" <Mirza.Sabah@epa.gov>
Date: September 19, 2019 at 4:37:33 PM EDT
To: "Starfield, Lawrence" <Starfield.Lawrence@epa.gov>
Cc: "Shiffman, Cari" <Shiffman.Cari@epa.gov>
Subject: RE: VTC

Hi Larry,

Sorry for the delay. The key takeaways from VTCs are attached (FYI: they were in regional visits RA meeting materials)

Thanks,
Sabah

~~~~~~~~~~~~~~~~~~~~~~~~

Sabah Mirza, Special Assistant
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW, 3207E WJC South
Washington, DC 20460
Office: 202-564-8176

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Sent: Monday, September 16, 2019 3:18 PM
To: Shiffman, Cari <Shiffman.Cari@epa.gov>; Mirza, Sabah <Mirza.Sabah@epa.gov>
Subject: VTC

Please send me (on Wednesday, not today) the document showing the key takeaways from the VTCs. Thanks.

Larry
~~~~~~~~~~~~~~~~~~~~~~~~

Summary of feedback for OECA HQ/Regional VTCs

(provided by Kathleen on 8/21):

I. National Data Pull. For this round of VTCs, we pulled data on traditional metrics

Ex. 7(E), Ex. 5 - DP

II. Themes reinforced by Susan and Larry

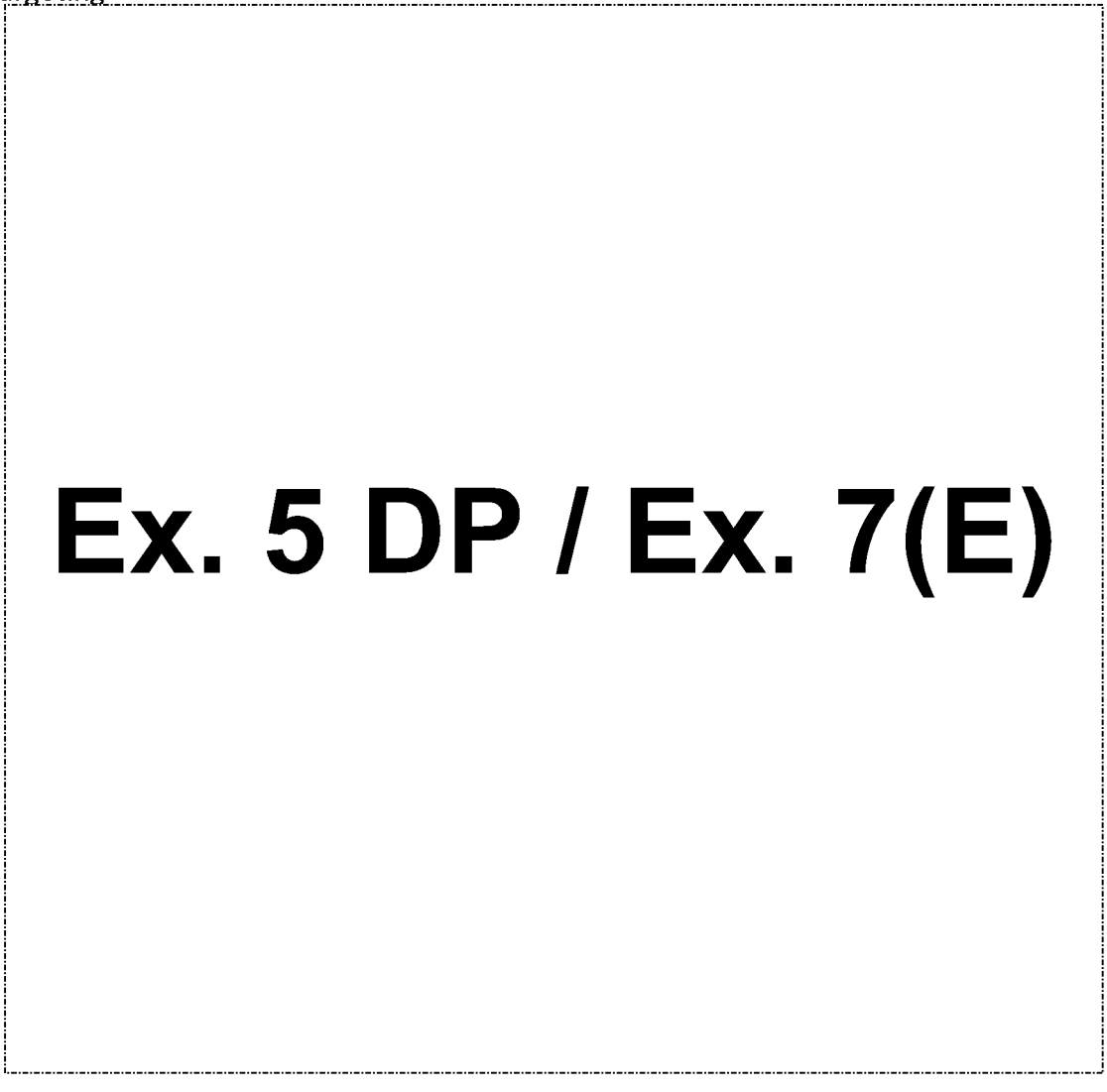
a. Data is useful to help us manage our programs. We are not setting targets or giving out demerits.

Ex. 5 Deliberative Process (DP)

III. Common themes heard from the Regions

Ex. 7(E)

b. NCIs
    i. Regions are on-board with the NCIs and they like that they're phrased broadly to allow for flexibility in identifying targets
    ii. For DW, Regions need to work closely with states and discuss EPA/state roles as well as determine ECAD/program roles. Regions are trying to staff up and get inspectors credentialed.
c. Areas of focus
    i. There is a lot of focus on direct implementation programs
    ii. CD oversight (tracking compliance with entered CDs) and CD amendments are time and resource intensive; both are prevalent in the CWA muni CDs (Financial Capability Assessment)
    iii. ESAs are effective tools that regions like to use
d. Other concerns
    i. A few regions raised concerns about DOJ, and the SEP issue specifically. Some are considering dropping SEPs to move cases forward (Region 2). At least one region said it is not inclined to refer cases and would seek waiver to take cases
e. Targeting



Ex. 5 DP / Ex. 7(E)

IV. Preliminary Observations

a.

b.

c. Ex. 5 Deliberative Process (DP)

Appointment

From: Hannon, Arnita [Hannon.Arnita@epa.gov]
Sent: 3/27/2017 5:30:03 PM
To: Hannon, Arnita [Hannon.Arnita@epa.gov]; Coleman, Sam [Coleman.Sam@epa.gov]; Starfield, Lawrence [Starfield.Lawrence@epa.gov]; Gray, David [gray.david@epa.gov]; Assunto, Carmen [Assunto.Carmen@epa.gov]; Shinkman, Susan [Shinkman.Susan@epa.gov]; Brown, Byron [brown.byron@epa.gov]; Bennett, Tate [Bennett.Tate@epa.gov]; Matthews, Demond [matthews.demond@epa.gov]
CC: Bowles, Jack [Bowles.Jack@epa.gov]

Subject: Meeting with Mayor Turner (Houston, TX) - Re: SSO Issues
Attachments: City of Houston Briefing Paper (3-24-17).docx
Location: 3530 WJC North 866.299.3188/Code: 2025643704

Start: 3/28/2017 9:15:00 PM
End: 3/28/2017 9:45:00 PM
Show Time As: Busy

Update: Region VI Briefing Paper Attached

866.299.3188/Code: 2025643704
Meeting: Mayor Sylvester Turner (Houston, TX)
Re: City's SSO Issues
Accompanying Mayor Turner: Susan Lent (Akin Gump, Washington, DC); William "Bill" Kelly, City of Houston Director of Intergovernmental Affairs.

EPA Staff: Layne Bangerter, DAA for Intergovernmental Relations (OCIR: Welcome/Introductions); Larry Starfield, Acting Assistant Administrator, Office of Enforcement and Compliance Assurance; Susan Shinkman, Director, OECA's Office of Civil Enforcement; Byron Brown, Deputy Chief of Staff for Policy.
Region VI: Sam Coleman, Acting Regional Administrator, David Gray, Acting Deputy Regional Administrator; Carmen Assunto, Regional Intergovernmental Contact

To: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Mackey, Cyndy[Mackey.Cyndy@epa.gov]
From: Starfield.Lawrence@epa.gov[Starfield.Lawrence@epa.gov]
Sent: Fri 4/26/2019 12:08:05 PM (UTC)
Subject: Re: Monday's ENRD call

I believe the call with DOJ will be Tuesday, and the SEP re-brief on Monday.

Sent from my iPhone

On Apr 25, 2019, at 10:25 PM, Kelley, Rosemarie <Kelley.Rosemarie@epa.gov> wrote:

> Susan –
>
> I know that you want to discuss the SEP issue on Monday in preparation for our meeting with the Principal Deputy Associate Attorney General next week and Jeff would like to explore with you any additional steps that could be taken at t Ex. 7(A)
>
> Anything else you would like to add to the agenda?
>
> Rosemarie
>
> Regards,
> Rosemarie A. Kelley, Director
> Office of Civil Enforcement
> Office of Enforcement and Compliance Assurance
> 202-564-4014

To: Bodine, Susan[bodine.susan@epa.gov]
From: Starfield.Lawrence@epa.gov[Starfield.Lawrence@epa.gov]
Sent: Mon 9/23/2019 12:04:12 AM (UTC)
Subject: Re: DOJ follow up

What do you think about the value of having the DOJ call on Monday — is it worth asking for an update, or should we wait to see what happens next Friday?

Sent from my iPhone

On Sep 21, 2019, at 8:21 PM, Bodine, Susan <bodine.susan@epa.gov> wrote:

> I elevated to Claire on SEPs
>
> Sent from my iPhone
>
> On Sep 21, 2019, at 12:08 PM, Starfield, Lawrence <Starfield.Lawrence@epa.gov> wrote:
>
> > Susan,
> >
> > I spoke to Bruce Gelber. A couple of points.
> >
> > 1. Meeting? There is a "phone call" on your calendar with Jeff for next Friday (9/27) at 10 am, and
>
> **Ex. 5 AC/DP**

Ex. 5 DP / AWP

> > 3. Maui – Bruce heard that the case *is* going to settle.
> >
> > Let me know what you think, especially re: point 2. Thanks.
> >
> > Larry
> > This message is CONFIDENTIAL, and may contain legally privileged information. If you are not the intended recipient, or believe you received this communication in error, please delete it immediately, do not copy, and notify the sender. Thank you.

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
From: Bodine, Susan[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8C2CC6086FCC44C3BE6B5D32B262D983-BODINE, SUS]
Sent: Mon 8/19/2019 7:29:47 PM (UTC)
Subject: RE: SEPs

ok

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Sent: Monday, August 19, 2019 3:25 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: SEPs

Susan – how about this note?

****

Rosemarie/Karin,

Ex. 5 Deliberative Process (DP)

Larry

To: Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Porter, Amy[Porter.Amy@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]; Pollins, Mark[Pollins.Mark@epa.gov]
Cc: Shiffman, Cari[Shiffman.Cari@epa.gov]; Mirza, Sabah[Mirza.Sabah@epa.gov]
From: Bodine, Susan[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8C2CC6086FCC44C3BE6B5D32B262D983-BODINE, SUS]
Sent: Mon 8/19/2019 2:42:35 PM (UTC)
Subject: SEPs

Ex. 5 AC/AWP/DP, Ex. 7(A)

Susan

To: Traylor, Patrick[traylor.patrick@epa.gov]
Cc: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Denton, Loren[Denton.Loren@epa.gov]; Theis, Joseph[Theis.Joseph@epa.gov]
From: Shinkman, Susan[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=738C02CAB58044BEB31A5DBB945056B3-SHINKMAN, SUSAN]
Sent: Tue 8/1/2017 5:38:05 PM (UTC)
Subject: Houston Briefing Paper
City of Houston Briefing Paper (8_1_17).docx

Patrick,

As we discussed yesterday, attached is a short background paper on the pending Houston CWA enforcement case.

Susan

Susan Shinkman
Director, Office of Civil Enforcement
U.S. Environmental Protection Agency
Washington, DC
202-564-3257

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Cozad, David[Cozad.David@epa.gov]; Koslow, Karin[Koslow.Karin@epa.gov]; Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]
From: Porter, Amy[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8A3C7DFBB2E445A7A6D37AABBE73D06B-APORTE02]
Sent: Fri 8/9/2019 1:43:05 PM (UTC)
Subject: RE: DOJ Begins Rejecting SEPs In Municipal Settlements, Undercutting Policy

Thank you, Larry.

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Sent: Friday, August 09, 2019 9:40 AM
To: Cozad, David <Cozad.David@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: Fwd: DOJ Begins Rejecting SEPs In Municipal Settlements, Undercutting Policy

In case you couldn't read the article (I couldn't access it on my phone).

Sent from my iPhone
Begin forwarded message:

> **From:** "Egan, Patrick" <egan.patrick@epa.gov>
> **Date:** August 9, 2019 at 9:10:37 AM EDT
> **To:** "Starfield, Lawrence" <Starfield.Lawrence@epa.gov>
> **Subject: RE: DOJ Begins Rejecting SEPs In Municipal Settlements, Undercutting Policy**
>
> Okay. Sorry about that. Here you go. Hopefully this comes through.

DOJ Begins Rejecting SEPs In Municipal Settlements, Undercutting Policy

August 08, 2019

AUSTIN, TX -- The Department of Justice (DOJ) is rejecting supplemental environmental projects (SEPs) in settlements it is negotiating with local governmental agencies, a move that appears to undercut department policy that says it will approve the projects as part of deals provided they comply with EPA's SEP policy, attorneys say.

The rejections have begun being communicated over the past month, according to one industry attorney familiar with negotiations in several clean water settlements between DOJ and local governments, coming after years of negotiations where DOJ officials indicated the projects were likely to be approved.

A second source, industry attorney Nathan Vassar, told an Aug. 1 session of the Texas Environmental Superconference here that if attorneys have a SEP to propose as part of a federal settlement, "it will take some real convincing because apparently the ongoing discussions -- and this is more at DOJ than it is at EPA -- are that, 'We're not going to allow SEPs as part of the enforcement protocol.'"

Vassar said this marks a change from past practice, when Trump officials told attorneys representing municipalities that their broader efforts to limit the use of SEPs would not generally apply in settlements involving local government entities. "We were told on several occasions, 'On municipal enforcement, if you like your SEP, you can keep your SEP'," he said.

However, that is no longer the case, Vassar said. "We learned just this week, it may be news to some . . . A SEP as a part of an enforcement

mechanism is not going to be pursued as a part of this administration."

A DOJ spokesman denies there has been a policy change, saying all department guidance is being followed and declining to comment on whether new guidance has been issued.

DOJ's "Environment and Natural Resources Division [(ENRD)] is following all current [DOJ] memoranda, including those issued by the Division itself and by the Attorney General," the spokesman says.

The spokesman declined to clarify whether that means SEPs can be approved or if there is a new document prohibiting them.

An EPA spokesman says the agency has not changed its 2015 policy regarding use of SEPs in settlement agreements. But the spokesman noted that former Attorney General Jeff Sessions, in a 2018 policy, had required that "judicial settlements with a state or local entity that include SEPs must first be reviewed and approved by the Associate Attorney General."

The new prohibition on SEPs renews focus on the issue, which has raised concerns in the past. The concern stemmed initially from Sessions' June 2017 memo banning settlements that included payments to third parties. Sessions opposed such payments because the parties were "neither victims nor parties to the lawsuits."

Some GOP lawmakers also complained that such settlements amount to "sweetheart deals" for environmental groups that benefitted from SEPs.

But many attorneys warned at the time that the prohibition would drastically impair their ability to settle EPA-related cases, and they strongly defended SEPs as providing a major incentive for environmental settlements with local both governments and private industry.

For example, some municipal officials were concerned that any limitation on the use of SEPs would hamper their efforts to expand the use of SEPs to offset stipulated penalties.

EPA Policy

After the uproar, DOJ's then-acting ENRD chief Jeff Woods in a January 2018 memo clarified exceptions to the payment ban, including for projects that comply with EPA's 2015 SEP policy.

Then, Sessions in a November 2018 policy wrote that settlements with municipal entities that included SEPs had to win approval from the associate attorney general for ENRD.

While the policy barring payments to third parties has been implemented, it faces some legal uncertainty as a federal court in Washington, D.C., has so far declined a DOJ request to drop a SEP from an already approved settlement with Harley Davidson -- more than two years after the request was first made.

Now, industry sources say DOJ is now rejecting approvals of municipal SEPs, raising questions about how to proceed.

"What we are starting to see happen is where we proposed SEPs we thought would be OK, and that everyone indicated were OK, but of course did not have final approval, are now getting rejected," the first industry source says.

DOJ is communicating to these attorneys that the settlements will not be approved if they contain the SEPs, but the source says it is unclear who made the change and why. No one at DOJ "has cited new documents to us," the source says.

It is also unclear whether any of the settling parties will seek to challenge the rejection of the SEPs. "We have to debate, 'Ok do you challenge it and go to higher levels to try to convince [DOJ] why you should be able to do this, or do you just say, 'OK, we're going to put more money in the penalty?'"

These discussions are "just happening now . . . we are engaged in thinking about that right now." The answer will be based on how badly the

setting party wants to do the SEP "or whether it can get the case done, pay more money and move on," the source adds. "We have to think about each case and whether it is worth having that fight."

This source has "not had any direct discussions with someone at DOJ or EPA other than being told they are not accepting that SEP."

The attorney notes that including SEPs in local government settlements has "been very valuable" and "helped us get to agreements in situations where municipalities feel very strongly that if they pay money it should go toward the community, and hopefully go to improving water quality for the community, and not get sent to D.C. to go to some federal agency."

City councils are more apt to approve settlements if they include incentives such as SEPs that require tree planting or repairing a sewer line, the source explains. However, it is also unclear, the source notes, whether dropping a SEP at this stage will tank the overarching settlement and result in litigation.

The industry source says when the policies first came out, it appeared they would not restrict SEPs by municipalities unless the governments were paying contractors to do the work, rather than having their own employees do so.

Now, the source says, even if a city employee were to plant trees on private property as part of a SEP, that appears to be prohibited as well, because DOJ "would say you are providing value to that property owner, and that is something you cannot do."

The source adds that if all SEPs are effectively banned, that would "be really unfortunate" because "they helped make it easier to reach agreements and provided real environmental benefits to communities."

The source says it is difficult to identify the universe of threatened SEPs because the Trump DOJ has not initiated many cases, so a lot of the cases being negotiated were started under the Obama administration, continued into Trump "and now we're being told we can't do it."

The source says the policy is less problematic if "it is only the policy for the next year and a half." But if it "lasts into another administration," then it would "affect a lot of cases" and have a "substantial" impact on settlements.

The last case this source was involved with that had a SEP -- which required a city to improve a stream -- was approved by a court in early 2018. -- *Dawn Reeves* (dreeves@iwpnews.com) & *Lee Logan* (llogan@iwpnews.com)

Related News | Litigation | Transition 2016-2017 |
220946

Patrick J. Egan, M.P.A.
Deputy Director of Communications
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (MC: 2201A)
Washington, DC 20460
Office: 202-564-4059 | Cell: 202-440-3883

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Sent: Friday, August 9, 2019 9:03 AM
To: Egan, Patrick <egan.patrick@epa.gov>
Subject: Re: DOJ Begins Rejecting SEPs In Municipal Settlements, Undercutting Policy

This requires a log in. Can you send the full article?

Sent from my iPhone

On Aug 9, 2019, at 8:58 AM, Egan, Patrick <egan.patrick@epa.gov> wrote:

Here you go.

https://insideepa.com/weekly-focus/doj-begins-rejecting-seps-municipal-settlements-undercutting-policy

Patrick J. Egan, M.P.A.
Deputy Director of Communications
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (MC: 2201A)
Washington, DC 20460
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From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Sent: Friday, August 9, 2019 8:54 AM
To: Hull, George <Hull.George@epa.gov>; Egan, Patrick <egan.patrick@epa.gov>
Subject: Fwd: DOJ Begins Rejecting SEPs In Municipal Settlements, Undercutting Policy

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> **From:** "Traylor, Patrick" <traylor.patrick@epa.gov>
> **Date:** August 8, 2019 at 7:02:22 PM EDT
> **To:** "Bodine, Susan" <bodine.susan@epa.gov>, "Starfield, Lawrence" <Starfield.Lawrence@epa.gov>
> **Cc:** "Hull, George" <Hull.George@epa.gov>
> **Subject: Fwd: DOJ Begins Rejecting SEPs In Municipal Settlements, Undercutting Policy**
>
> **Patrick Traylor**
> Deputy Assistant Administrator
> Office of Enforcement and Compliance Assurance
> U.S. Environmental Protection Agency
> (202) 564-5238 (office)
> (202) 809-8796 (cell)
> Begin forwarded message:
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> > **Subject: DOJ Begins Rejecting SEPs In Municipal Settlements, Undercutting Policy**
> > **Reply-To:** insideepa-alerts@iwpnews.com
>
> August 8, 2019

THE WEEKLY FOCUS

An in-depth look from our editors at a specific issue facing the Agency, pub weekly.

DOJ Begins Rejecting SEPs In Municipal Settlements, Undercu Policy

AUSTIN, TX -- The Department of Justice (DOJ) is rejecting supplemental environmental projects (SEPs) in settlements it is negotiating with local governmental agencies, a move that appears to undercut department polic says it will approve the projects as part of deals provided they comply with SEP policy, attorneys say.

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To: Traylor, Patrick[traylor.patrick@epa.gov]
Cc: Egan, Patrick[egan.patrick@epa.gov]; Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Hull, George[Hull.George@epa.gov]
From: Bodine, Susan[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8C2CC6086FCC44C3BE6B5D32B262D983-BODINE, SUS]
Sent: Thur 8/8/2019 4:05:37 PM (UTC)
Subject: RE: InsideEPA Response

Typo corrected below.

From: Traylor, Patrick <traylor.patrick@epa.gov>
Sent: Thursday, August 8, 2019 12:04 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Cc: Egan, Patrick <egan.patrick@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Hull, George <Hull.George@epa.gov>
Subject: Re: InsideEPA Response

No comments.

Patrick Traylor
Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
(202) 564-5238 (office)
(202) 809-8796 (cell)
On Aug 8, 2019, at 11:55 AM, Bodine, Susan <bodine.susan@epa.gov> wrote:

My redraft. Any comments? Also needs coordination with DOJ.

Ex. 5 AC/AWP/DP

From: Egan, Patrick <egan.patrick@epa.gov>
Sent: Thursday, August 8, 2019 11:01 AM
To: Bodine, Susan <bodine.susan@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Hull, George <Hull.George@epa.gov>
Subject: InsideEPA Response

Susan, Larry and Patrick,

Here is a proposed response to InsideEPA's inquiry. Let me know if you have any comments.

Thanks,
Pat

Ex. 5 Attorney Work Product (AWP)/AC/DP

Ex. 5 Attorney Work Product (AWP)/AC/DP

Patrick J. Egan, M.P.A.
Deputy Director of Communications
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (MC: 2201A)
Washington, DC 20460
Office: 202-564-4059 | Cell: 202-440-3883

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
Cc: Egan, Patrick[egan.patrick@epa.gov]
From: Hull, George[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F6DD2FAB273845218756495C7A2D94AD-GHULL]
Sent: Wed 8/7/2019 2:14:04 PM (UTC)
Subject: RE: SEPs

Thanks. I'll let you know if anything comes in. - George

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Sent: Wednesday, August 07, 2019 10:13 AM
To: Hull, George <Hull.George@epa.gov>
Cc: Egan, Patrick <egan.patrick@epa.gov>
Subject: RE: SEPs

We've gotten one inquiry from a private attorney, and my guess is that we'll get more inquiries. I'm talking to Susan about a standard statement.

Larry

From: Hull, George <Hull.George@epa.gov>
Sent: Wednesday, August 07, 2019 9:48 AM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Egan, Patrick <egan.patrick@epa.gov>
Subject: RE: SEPs

No, I don't recall any inquiries on this topic. - George

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Sent: Wednesday, August 07, 2019 9:47 AM
To: Hull, George <Hull.George@epa.gov>
Subject: SEPs

George,

Have we gotten any questions from the press about whether there is a change in the Agency's SEP policy for municipalities? I can't recall any (yet).

Larry

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
Cc: Shiffman, Cari[Shiffman.Cari@epa.gov]
From: Mirza, Sabah[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=816BF1F9B67D4892BDAC00DE2EABDA3F-MIRZA, SABAH]
Sent: Wed 8/7/2019 1:46:34 PM (UTC)
Subject: RE: R8 q&a
Updated Q &A for July 15 All Hands.docx

Here you go Larry.

Thanks,
Sabah

~~~~~~~~~~~~~~~~~~~~~~~~

Sabah Mirza, Special Assistant
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW, 3207E WJC South
Washington, DC 20460
Office: 202-564-8176

From: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Sent: Wednesday, August 7, 2019 9:45 AM
To: Mirza, Sabah <Mirza.Sabah@epa.gov>
Cc: Shiffman, Cari <Shiffman.Cari@epa.gov>
Subject: R8 q&a

Sabah,

Can you re-send to me the Q's and A's that we got for the Region 8 visit? Thanks.

Larry
~~~~~~~~~~~~~~~~~~~~~~~~

Updated answers for the following questions (Updated Q 2 & 4)

Time: 2.30pm-3.30pm MST
Session: An all-hands meeting with ECAD staff and managers and ORC enforcement attorneys

5. Q & A session with Susan

Questions in advance from ECAD staff (to kick off Q and A session)

1. The use of Supplemental Environmental Projects (SEPs) in our settlements is an important means of achieving greater environmental benefit from our enforcement cases. We have heard that DOJ has raised concerns about SEPs. Can you share the current state of play regarding our use of SEPs in administrative and judicial cases?

   Suggested answer: *AAG Jeff Clark has taken the position that DOJ guidance issued Last November by AG Sessions on settlements with state and local governments prohibits SEPs with municipal/state governments because a SEP is not relief that could be obtained through litigation. In addition, AAG Clark has raised questions about SEPs more generally, but has not at this point taken a position. We are working with EES senior management, AAG Clark and Claire Murray, the Deputy Associate Attorney General (Jeff's superior), to try to resolve these concerns, and we will follow up when there is something to report.*

   I want to emphasize that this only affects SEPs in civil judicial cases. It does not in any way affect or restrict our independent administrative authority, and you should continue to fully pursue SEPs in administrative settlements in the same way that you always have. I see SEPs as beneficial to settlement of cases in many circumstances.

2. We are hearing complaints from non-EPA inspectors who have federal credentials related to getting access to our Inspector Wiki website where they obtain their forms and training to obtain and renew their credentials. Creating a simple website link and simple password resets would reduce the frustration. Who should we speak with regarding these and other suggested solutions?

   Answer: *OECA's Inspector Wiki provides federal, tribal, state, local inspectors with comprehensive on-line access to inspector-related information and training. The Office of Mission Support (formerly the Office of Environmental Information) develops and manages the method and forms non-EPA users use to request access to the Inspector Wiki and ECHO. OECA is responsible for approving or disapproving a request after its submittal. Note: OMS manages the password-reset process; OECA has no role in this process. OECA can work with Region 8 to increase the ability of non-EPA inspectors to understand how to access the Inspector Wiki. For additional questions, please contact the Office of Compliance's Chad Carbone at 202-564-2523 or Tracy Back at 202-564-7076*

3. We understand that EPA has not been allowed to participate in the hiring process for tribal inspectors associated with tribal assistance grants. It would greatly improve the quality of the inspections if EPA could participate in the hiring process. If EPA HQ would initiate new hiring requirements when grants are awarded it could solve this issue. Is this something you would support?

   ***Answer**: No. EPA's long-standing position, based on law and policy, is not to direct the hiring of a particular person for activities under a grant or cooperative agreement. That said, EPA could place terms and conditions in a cooperative agreement that allow the Agency to approve the qualifications of key personnel after a hiring decision is made; this approach is not possible in a grant. For example, EPA could advise the recipient on the types of training an inspector will need to obtain a federal credential to conduct inspections on the Agency's behalf (e.g., the OECA Basic Inspector Training, OECA media-specific training, EPA health and safety training, and on-the-job training). This is important because EPA will only issue a federal credential to an inspector who has taken such training. EPA could review the qualifications of individuals the tribe intends to hire as inspectors to ensure that he or she has been properly trained for federal credentialing purposes. Becoming directly involved in the tribe's hiring decision, however, is not permissible. OECA could work with EPA's Office of Grants and Debarment to explore the best way to ensure the recipients understand the limitations contained terms and conditions applicable to cooperative agreements and any options related to grants.*

   The Office of Grants and Debarment's national programmatic term and condition for cooperative agreements provides in pertinent part: "EPA will be substantially involved in this agreement. Substantial involvement by the EPA Project Officer may include…6) Consultation with EPA regarding the selection of key personnel (EPA's involvement is limited to reviewing the technical qualifications of key personnel and the recipient will make the final decisions on selection. EPA's Project Officer will not suggest, recommend or direct the recipient to select any individual)."

Ex. 5 AC / Ex 5 AWP / Ex. 7(A)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 10 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy

FROM: Cynthia Giles
Assistant Administrator

TO: Regional Administrators

I am pleased to issue the 2015 Update to the EPA Supplemental Environmental Projects Policy (Update or 2015 Update), which reflects and incorporates by reference all of the guidance and implementation decisions made about Supplemental Environmental Projects (SEPs) since the issuance of EPA's SEP Policy in 1998. This Update supersedes the 1998 Policy, and is effective immediately.

Consolidating the wealth of existing SEP guidance is intended to encourage use of the Policy by helping facilitate and streamline the inclusion of SEPs in civil enforcement settlements whenever appropriate. The 2015 Update is also intended to underscore the Agency's continuing strong support for SEPs, which can be powerful tools to secure significant environmental and public health benefits beyond those achieved by compliance, and to help address the needs of communities impacted by violations of environmental laws.

The Update covers when it is appropriate to include a SEP in an enforcement settlement, how to evaluate proposed SEPs, and the information and certifications that must be included in settlement documents. It reflects all SEP-related guidance documents issued by OECA over the past seventeen years, as well as the policy and implementation decisions made during two national meetings organized by OECA's Principal Deputy Assistant Administrator.[1] It also provides clarifying language on points of longstanding implementation practice and technical corrections. The 2015 Update highlights some notable Agency priorities, including Children's Health, Environmental Justice, Innovative Technology and Climate Change. In addition, for ease of use and clarity certain sections of the Update have been edited and reordered, and the Policy now includes a topical Table of Contents.

[1] A complete list of these policy and implementation memoranda and decisions can be found at http://intranet.epa.gov/oeca/oce/slpd/sep.html.

The Update reflects the collaborative efforts of our National SEP Work Group, our Regional Counsel and Enforcement staff, our Office of General Counsel, the Department of Justice, and OECA staff from the Office of Civil Enforcement, the Federal Facilities Enforcement Office, the Office of Environmental Justice and the Office of Site Remediation Enforcement, as well as input from several EPA program offices. I appreciate their collective efforts and thank them for their willingness to help facilitate this Update.

My hope is that this Update will enable case teams to more efficiently and effectively include SEPs in settlement of civil enforcement cases, and I continue to actively encourage all enforcement practitioners to consider SEPs wherever they may be appropriate.

Questions regarding the 2015 Update may be directed to Caroline Makepeace (202-564-6012), Beth Cavalier (202-564-3271) or Jeanne Duross (202-564-6595) in the Special Litigation and Projects Division, Office of Civil Enforcement.

Attachment

cc:

Office of General Counsel
Regional Counsels and Deputy Regional Counsels
Regional Enforcement Directors
Chief, Environmental Enforcement Section, Department of Justice
OECA Office Directors
Regional Enforcement Coordinators
Headquarters and Regional SEP Policy Coordinators

U.S. Environmental Protection Agency
Supplemental Environmental Projects Policy
2015 Update

United States Environmental Protection Agency
Supplemental Environmental Projects (SEP) Policy
2015 Update

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United States Environmental Protection Agency
Supplemental Environmental Projects Policy
2015 Update

I. INTRODUCTION

A. Background

A Supplemental Environmental Project (SEP) is an environmentally beneficial project or activity that is not required by law, but that a defendant[1] agrees to undertake as part of the settlement of an enforcement action. SEPs are projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. In settlements of environmental enforcement cases, the United States Environmental Protection Agency (the EPA or the Agency) requires alleged violators to achieve and maintain compliance with federal environmental laws and regulations, take action to remedy the harm or risk caused by past violations, and/or to pay a civil penalty. In certain instances, SEPs may be included in the settlement. In 1998, the EPA issued the Supplemental Environmental Projects Policy (Policy)[2] setting forth the types of projects that are permissible as SEPs, the terms and conditions under which a SEP may become part of a settlement, and the appropriate way to calculate a final penalty in light of the inclusion of a SEP in a settlement. The primary purpose of the SEP Policy is to encourage and obtain environmental and public health protection and benefits that may not otherwise have occurred in the settlement of an enforcement action.

The Agency encourages the use of SEPs that are consistent with this Policy. Case teams should consider SEPs early in the settlement process and, in appropriate cases, provide SEP ideas to defendants. SEPs are an important component of the EPA's enforcement program, but may not be appropriate in the settlement of all cases. Even in the absence of a SEP, enforcement settlements provide substantial benefits to communities and the environment. Penalties promote environmental compliance by deterring future violations by the defendant and other members of the regulated community. Penalties also help ensure a national level playing field for the regulated community. Injunctive relief measures ensure that compliance is achieved and maintained, and redress the harm caused by a violation, thereby providing long-term significant environmental and public health benefits to the impacted community. Where a proposed project could reasonably comprise part of the injunctive relief portion of a settlement, it should not be a SEP.

B. Using this Policy

This Policy establishes a framework for the EPA to use in exercising its enforcement discretion in determining appropriate settlements. To include a proposed project in a settlement as a SEP, Agency enforcement and compliance personnel should:

---

[1] For ease of use and brevity, "defendant" shall be used to mean both defendants in civil judicial settlements and respondents in administrative settlements.
[2] U.S. ENVTL. PROT. AGENCY, EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY (May 1, 1998).

1. Ensure that the project conforms to the basic definition of a SEP (Section III);

2. Ensure that all legal guidelines are satisfied (Section IV);

3. Ensure that the project fits within one (or more) of the designated categories of SEPs (Sections V and VI);

4. Determine the appropriate amount of penalty mitigation to reflect the project's environmental and/or public health benefits using the evaluation criteria (Sections VIII and IX); and

5. Ensure that the project satisfies all of the EPA procedures, settlement requirements and other criteria (Sections X-XII).

In some cases, strict application of this Policy may not be appropriate, in whole or in part. In such cases, the litigation team may use an alternative or modified approach, with advance approval from the Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA).

C. Applicability

This Policy revises and supersedes the February 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements, the May 1995 Interim Revised Supplemental Environmental Projects Policy, and the May 1998 EPA Supplemental Environmental Projects Policy. It also reflects and incorporates by reference a number of memoranda and guidance documents that have been issued by the EPA since 1998 (*see* Appendix B). Where there may be inconsistencies between these documents and this Policy, this Policy shall supersede the memoranda and guidance documents. This Policy applies to settlements of all civil judicial and administrative enforcement actions filed after the effective date of this Policy and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of a SEP.

This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that the EPA administers. It may be used by the EPA and the Department of Justice (DOJ) in reviewing proposed SEPs in settlement of citizen suits. This policy also applies to federal agencies that are liable for the payment of civil penalties.

This is a settlement policy and thus is not intended for use by the EPA, defendants, courts, or administrative law judges at a hearing or in a trial. Further, the Agency's decision to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within the EPA's discretion. Even though a project appears to satisfy all of the provisions of this Policy, the EPA may decide, for one or more reasons, that a SEP is not appropriate (*e.g.*, the cost of reviewing a SEP proposal may be excessive, the

oversight costs of the SEP may be too high, the defendant may not have the ability or reliability to complete the proposed SEP, or the deterrent value of the higher penalty amount may outweigh the benefits of the proposed SEP).

This document is intended for use by EPA enforcement personnel in settling cases and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This document is not intended to supersede any statutory or regulatory requirements. Any inconsistencies between this document and any statute or regulation should be resolved in favor of the statutory or regulatory requirement. The EPA reserves the right to change this Policy at any time, without prior notice, or to act at variance with this Policy. This Policy does not create any rights, duties, or obligations, implied or otherwise, in any third parties.

II. SUPPORTING THE EPA'S MISSION

SEPs can provide additional environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. Therefore, SEPs are an important component of the EPA's enforcement program, although they may not be appropriate in the settlement of all cases. SEPs can also help to further the EPA's mission to protect public health and the environment, which includes, but is not limited to, protecting children's health, ensuring environmental justice, promoting pollution prevention, encouraging the development of innovative technologies that protect human health and the environment, and addressing climate change.

A. Children's Health

Protecting children's health from environmental risks is fundamental to the EPA's mission. Exec. Order No. 13045, *Protection of Children from Environmental Health Risks and Safety Risks*, 62 Fed. Reg. 19,885 (Apr. 23, 1997), directs each federal agency to "identify and assess environmental health risks and safety risks that may disproportionately affect children . . . ." The Executive Order recognizes the significant body of scientific knowledge demonstrating that children may suffer disproportionately from environmental health risks and safety risks.

Children are at increased risk because their neurological, immunological, and other systems are still developing and they eat, drink, and breathe more air in proportion to their body weight. Their smaller size and weight may diminish their protection from standard safety features, and their behavior patterns may make them more susceptible to exposure to environmental risks. Projects that reduce children's exposure to, or health impacts from, pollutants, and/or that reduce environmental risks to children in the community impacted by a violation are actively sought and encouraged.

B. Environmental Justice

The EPA defines "environmental justice" (EJ) as the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.

Exec. Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 16, 1994), acknowledges that certain segments of the nation's population are disproportionately burdened by pollutant exposure. The Executive Order requires, to the greatest extent practicable and permitted by law, that federal agencies make achieving environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental impacts of its programs, policies, and activities on minority and low income populations in the United States and its territories.

Further, the EPA has stated that the term "EJ concern" indicates "the actual or potential lack of fair treatment or meaningful involvement of minority, low-income, or indigenous populations or tribes in the development, implementation, and enforcement of environmental laws, regulations, and policies."[3]

Defendants are encouraged to consider SEPs in communities where there are EJ concerns. SEPs can help ensure that residents who spend significant portions of their time in, or depend on food and water sources located near the areas affected by violations will be protected. However, due to the non-public nature of settlement negotiations there are legal constraints on the information the EPA can share during settlement negotiations, which are discussed in more detail in Section VII. In some situations, members of a community impacted by an environmental violation may feel that they lack meaningful involvement in the enforcement process, including the selection of a SEP. While members of an impacted community ordinarily would not be part of settlement negotiations, the EPA strongly encourages defendants to reach out to the community for SEP ideas and prefers SEP proposals that have been developed with input from the impacted community. During the public comment period required for many judicial settlements and certain administrative settlements, community members are afforded an opportunity to review and comment on any of the settlement's terms, including any SEPs that may be part of the resolution.

Because many different types of projects could benefit communities with EJ concerns, and are not limited to specific techniques, processes or activities, they have not been confined to a particular SEP category. Rather, because promoting environmental justice through a variety of projects is an overarching goal, EJ is one of the six critical factors on which SEP proposals are evaluated (*see* Section VIII). SEPs that benefit communities with EJ concerns are actively sought and encouraged.

C. Pollution Prevention

The Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101-13109) identifies an environmental management hierarchy in which pollution "should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated

---

[3] U.S. ENVTL. PROT. AGENCY OFFICE OF POLICY, ECON., AND INNOVATION (OPEI), OPEI REGULATORY DEVELOPMENT SERIES, INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION, EPA'S ACTION DEVELOPMENT PROCESS (July 2010).

in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort . . . ." Selection and evaluation of proposed SEPs should be conducted in accordance with this hierarchy of environmental management (*e.g.*, SEPs that utilize techniques or approaches to prevent the generation of pollution are preferred over other types of pollution reduction or control strategies). Projects that prevent the generation of pollution often provide the chance to utilize new and innovative technologies. Pollution prevention is one of the listed SEP categories. Effectiveness in developing and implementing pollution prevention techniques and practices is also a factor in evaluating a SEP, and can be reflected in the degree of consideration accorded to the defendant in the calculation of the final settlement penalty, and such projects are actively sought and encouraged.

D. Innovative Technology

SEPs provide defendants with an opportunity to develop and demonstrate new technologies that may prove more protective of human health and the environment than existing processes and procedures. SEPs also provide the EPA with a unique opportunity to observe and evaluate new technologies which might, should they prove effective and efficient, lead to better standard industry practices. Technology innovations may also be a means to assure that future industry and other commercial practices are sustainable, reflect the best available technology, and lead to continued long-term pollution reductions and improved public and environmental health. Innovative technology can take a variety of forms and may be applied broadly across environmental media and commercial, industrial and municipal activities, processes and practices. Innovative enforcement tools supporting OECA's Next Generation Compliance, such as fenceline monitors, e-reporting, web posting of data and independent third-party audits, may be appropriate for consideration as SEPs where not achievable or appropriate as injunctive relief or mitigation in the context of a settlement.

Pollution reduction and pollution prevention projects often utilize innovative technologies, methodologies, and/or practices. Because of this wide-ranging potential for significant environmental and public health benefits, "innovation" is one of the six critical factors used to evaluate SEP proposals. SEPs that employ innovative technologies are actively sought and encouraged.

E. Climate Change

The Earth's climate is changing. Temperatures are rising, snow and rainfall patterns are shifting, and more extreme climate events – such as increased floods and droughts, coastal storms, and record high temperatures – are already taking place. These observed changes are linked to the climbing levels of carbon dioxide and other greenhouse gases in our atmosphere. Reducing greenhouse gas emissions through, for example, energy efficiency projects that reduce emissions by reducing energy demand can contribute to reducing climate change. Projects that address the causes of climate change and reduce or prevent emissions of climate change pollutants and greenhouse gases, such as carbon dioxide, may qualify as SEPs.

In addition to working to curb climate change by reducing emissions, community members are taking action to make their communities more resilient in the face of climate impacts. Preparing

infrastructure and natural ecosystems for the changes that will occur with a changing climate can help communities adapt to climate change and be more resilient in avoiding or recovering from events resulting from a changing climate. For example, in some areas where increased rainfall is expected, increased runoff can lead to greater stress on water infrastructure and to degradation of water quality. Anticipating those impacts can help a community plan ahead to limit the negative impacts of these changes. Projects that address the impacts of climate change and that help increase a community's resilience in the face of these impacts on ecosystems or infrastructure, may qualify as SEPs.

III. DEFINITION AND KEY CHARACTERISTICS OF A SEP

Supplemental environmental projects are defined as **environmentally beneficial projects** which a defendant agrees to undertake **in settlement of an enforcement action,** but which the defendant, or any other third party, is **not otherwise legally required to perform.** The three bolded key parts of this definition are described in more detail below.

A. "**Environmentally beneficial**" means a SEP must improve, protect, or reduce risks to public health or the environment. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits public health and/or the environment.

B. "**In settlement of an enforcement action**" means:

1. The defendant's commitment to perform the SEP is included in a legally enforceable settlement document;

2. The EPA has the opportunity to review and comment on the scope of the project before it is implemented; and

3. The project is not commenced until after the Agency has identified a violation (*e.g.*, issued a notice of violation, administrative order, or complaint).[4]

C. "**Not otherwise legally required to perform**" means the project or activity is not required by any federal, state, or local law or regulation or achievable under applicable environmental and other federal laws. SEPs cannot include actions which the defendant, or any other third party, is likely to be required to perform:

[4] Because the primary purpose of this Policy is to obtain environmental and/or public health benefits that would not have occurred "but for" the settlement, projects which the defendant has previously committed to perform or has begun implementing before the settlement is final are not eligible as SEPs.

1. As injunctive relief,[5] including as a mitigation project,[6] in the instant case;

2. As injunctive relief in another legal action the EPA, or another regulatory agency, could bring;

3. As part of an existing settlement or order in another legal action; or

4. By any other federal, state or local requirement.

The performance of a SEP reduces neither the stringency nor the timeliness requirements of federal environmental statutes and regulations. Performance of a SEP does not alter a defendant's obligation to remedy a violation expeditiously and return to compliance. Projects or actions that are not required, but that reflect standard industry practices, are generally not acceptable as SEPs, but should be considered as part of the injunctive relief package.

IV. LEGAL GUIDELINES

The EPA has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of a settlement. The evaluation of whether a proposed SEP is within the EPA's authority and consistent with all statutory and Constitutional requirements may be a complex task. Accordingly, this Policy uses the following legal guidelines to ensure that SEPs are within the Agency's and a federal court's authority, and do not run afoul of any Constitutional or statutory requirements.[7] Legal guidelines may not be waived, and are described below.

A. Nexus

1. All projects must have sufficient nexus. Nexus is the relationship between the violation and the proposed project.[8] Nexus ensures the proper exercise of the EPA's prosecutorial discretion and enables appropriate penalty mitigation for including the SEP in the settlement.

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[5] The statutes the EPA administers generally provide a court with broad authority to order a defendant to cease its violations, take necessary steps to prevent future violations, and to remediate any harm caused by the violations. If a court is likely to order a defendant to perform a specific activity in a particular case as injunctive relief or a mitigation project, such an activity does not qualify as a SEP.

[6] *See* Memorandum from Susan Shinkman, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Securing Mitigation as Injunctive Relief In Certain Enforcement Settlements* (2d ed., Nov. 14, 2012).

[7] These legal guidelines are based on federal law as it applies to the EPA; states may have more or less flexibility in the use of SEPs depending on their laws and this Policy does not purport to identify those requirements.

[8] The EPA's prosecutorial discretion to settle enforcement actions does not extend to the inclusion of SEPs that do not have a nexus to the violations being resolved. According to the Comptroller General of the United States (CG), enforcement settlements may contain "terms and undertakings that go beyond the remedies specifically" identified in the statute being enforced. However, the Agency's "settlement authority should be limited to statutorily authorized prosecutorial objectives: correction or termination of a condition or practice, punishment, and deterrence." *See Matter of: Commodity Futures Trading Commission – Donations Under Settlement Agreements*, 1983 WL 197623, B-210210, (Sept. 14, 1983). *See also Matter of: Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, 1990 WL 293769, B-238419, (Oct. 9, 1990).

2. A project may not be inconsistent with any provision of the underlying statutes that are the basis of the enforcement action. All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action.

3. Projects must relate to the underlying violation(s) at issue in the enforcement action. The project must demonstrate that it is designed to reduce:

   a. The likelihood that similar violations will occur in the future;

   b. The adverse impact to public health and/or the environment to which the violation at issue contributes; or

   c. The overall risk to public health and/or the environment potentially affected by the violation at issue.

   Nexus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred, at a different site in the same ecosystem, or within the immediate geographic area.[9, 10] SEPs may have nexus even if they address a different pollutant in a different medium, provided the project relates to the underlying violation(s).

4. SEPs may not be agreements to spend a certain amount on a project that will be defined later. For a case team to properly evaluate a SEP's characteristics (the "what, where, when" of the SEP), and establish the connection to the underlying violation being resolved, the type and scope of each project must be specifically described and defined. Without a well-defined project with clear environmental or public health benefit, the EPA cannot demonstrate nexus.

B. Augmentation and Other Issues

1. EPA Management or Control of SEPs

   a. The EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may the EPA retain authority to manage or administer the SEP. The EPA may, of

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[9] Ecosystem or geographic proximity is not by itself a sufficient basis for nexus; a project must always demonstrate a relationship to the violation in order to satisfy subparagraph a, b, or c in the definition of nexus. In some cases, a project may be performed at a facility or site not owned by the defendant, provided there is a relationship between the violation and the SEP. The immediate geographic area will generally be the area within a 50-mile radius of the site on which the violations occurred.

[10] Where a defendant proposes to perform the same activity at multiple facilities (including facilities without violations), nexus is easier to establish if the primary impact is at the same facility, or in the same ecosystem, or within the immediate geographic area as the violations, but the global SEP may be acceptable so long as at least part of it is at one of these locations.

course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.

b. The EPA may not direct, recommend, or propose that the defendant hire a particular contractor or consultant to carry out the SEP (the "SEP implementer"). Similarly, the Agency may not direct, recommend or propose a specific organization to be the recipient of a SEP (the "SEP recipient"). The EPA may retain the right to disapprove contractors, consultants or organizations that the defendant proposes for Agency consideration, provided the Agency's decision is based on objective criteria for assessing the entity's qualifications (*e.g.*, experience, capacity, technical expertise) and fitness. The Agency may also specify the type of organization that will be the SEP recipient.

2. Federal Appropriations and Federally-Performed Activities[11]

a. EPA-Specific:

i. A project may not be used to satisfy the EPA's statutory obligation or another federal agency's obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, the EPA may not consider projects that do or would appear to circumvent that prohibition.

ii. A project may not provide additional resources to support (including in-kind contributions of goods and services) specific activities performed by EPA employees or EPA contractors.[12] For example, if the EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a project may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure. A project may not provide resources (including, but not limited to, funding, services and/or goods) to perform work on EPA-owned property.

iii. SEPs may not provide the EPA with additional resources to perform a particular activity for which the EPA receives a specific appropriation. SEPs may not have the effect of providing a recipient in a particular federal financial assistance transaction with the EPA with additional resources for the same specific activity described in the terms or scope

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[11] Appendix A, AUGMENTATION OF APPROPRIATIONS: REASONABLE INQUIRY REGARDING FEDERAL APPROPRIATIONS, provides case teams with assistance in ensuring that proposed SEPs meet the conditions of Legal Guidelines IV.B.2 and IV.C.

[12] This does not apply where the EPA has statutory authority to accept funds or other things of value from a non-federal entity.

of work for the transaction.[13] Examples of federal financial assistance transactions include grants, cooperative agreements, federal loans, and federally guaranteed loans.

b. Other Federal Agencies:

i. A project may not provide resources (including, but not limited to, funding, services and/or goods) to perform work on federally-owned property, or provide additional support (including in-kind contributions of goods and services) for a project performed by another federal agency.[14]

ii. SEPs may not have the effect of providing a recipient in a particular federal financial assistance transaction with another federal agency with additional resources for the same specific activity described in the terms or scope of work for the transaction. Examples of federal financial assistance transactions include grants, cooperative agreements, federal loans and federally guaranteed loans.

C. Augmentation: Reasonable Inquiry and Certification

1. By Defendants: In all settlements that include a SEP, defendants must certify that they have performed a reasonable inquiry to ensure that a SEP does not inadvertently augment federal appropriations. The following must be included in all settlement documents:

Defendant certifies that:

a. It is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in paragraph X; and

b. It has inquired of the SEP recipient and/or SEP implementer [use proper names where available] whether either is a party to an open federal

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[13] OECA's 2011 interim revisions to Legal Guideline 5.b. of the 1998 SEP Policy included an additional prohibition on projects which were described in an unsuccessful federal financial assistance transaction proposal submitted to the EPA within two years of the date of the settlement, unless the Agency had rejected the proposal as statutorily ineligible. *See* Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Transmittal of the Office of General Counsel's Opinion on Legal Guidelines Under the 1998 Supplemental Environmental Projects Policy Relating to Impermissible Augmentation of Appropriations* (Apr. 18, 2011). With approval of the Office of General Counsel, this prohibition has been eliminated.

[14] This does not apply to SEPs in which a federal agency expends appropriated funds on the project under a settlement of a federal facility enforcement case, or when a federal agency has statutory authority to accept funds or other items of value from a non-federal entity.

financial assistance transaction that is funding or could fund the same activity as the SEP and has been informed by the recipient and/or the implementer [use proper names where available] that neither is a party to such a transaction.

2. By the EPA: The EPA also has an obligation to make a reasonable inquiry to ensure that a SEP does not inadvertently augment federal appropriations, and this should be documented by the case team in its SEP approval memo and case file.

D. Augmentation Exception: Diesel Emissions Reduction Projects

In past fiscal years, the EPA has received specific appropriations for diesel emissions reduction projects. Regardless of whether the EPA continues to receive a specific appropriation, diesel emissions reduction projects may be accepted as SEPs because, in 2008, Congress enacted legislation granting the EPA authority to accept diesel emissions reduction SEPs, creating an express exception to the prohibition on augmenting appropriations for these types of projects.[15] Thus, for these projects, augmentation inquiries based on Legal Guidelines IV.B.2.a.iii and b.ii need not be performed, and the certification above, in Section IV.C.1, is not required. EPA case teams should, however, make the other augmentation inquiries, based on Legal Guidelines IV.B.2.a.i and ii, and IV.B.2.b.i.

In addition, the authorizing statute[16] requires that any settlement with a diesel emissions reduction SEP include the following certification:

Defendant certifies under penalty of law that it would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction Supplemental Environmental Project, if the Agency were precluded by law from accepting a diesel emissions reduction Supplemental Environmental Project.

Also, any diesel emissions reduction SEP must comport with all other conditions of this Policy, including the nexus requirement.[17] Diesel emissions reduction SEPs may not be implemented via cash donations. In the absence of a concurrent obligation for the defendant to ensure that the project occurs and is satisfactorily completed, it will be difficult to demonstrate that the SEP has nexus.

V. CATEGORIES OF SEPs

The EPA has identified seven specific categories of projects which may qualify as SEPs. Many SEPs may fall into more than one category. In addition, there is an eighth category for "Other"

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[15] *See* Act of June 30, 2008, Pub. L. No. 110-255, § 1, 122 Stat. 2423.
[16] *Id.* at § 2, 122 Stat. 2423.
[17] *See* Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects to Reduce Diesel Emissions* (July 18, 2008).

projects that meet all conditions of the SEP Policy but do not readily fit in one of the seven specific categories.

A. Public Health

Public health projects include those that provide diagnostic, preventative and/or health care treatment related to the actual or potential harm to human health caused by the violation. This includes, but is not limited to, epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy. Examples of public health SEPs include blood lead level testing, asthma screening and treatment and mobile health clinics. Public health SEPs may also include projects such as mosquito eradication programs or donation of antimicrobial products to assist in natural disaster situations. Public health SEPs are acceptable only where the primary beneficiary of the project is the population that was harmed or put at risk by the violations.

B. Pollution Prevention

A pollution prevention project prevents pollution at its source, before it is generated. It includes any practice that reduces the quantity and/or toxicity of pollutants entering a waste stream prior to recycling, treatment, or disposal. After the pollutant or waste stream has been generated pollution prevention is no longer possible, and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods (*i.e.*, pollution reduction).

Source reduction projects may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project which protects natural resources through conservation or increased efficiency in the use of energy, water, or other materials, as well as "in-process recycling" wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on-site.

Projects that replace or reduce the use of traditional energy sources with alternative energy sources or that implement energy efficiency activities, potentially reducing air pollutants associated with electric power generation and greenhouse gases that contribute to climate change, may qualify as pollution prevention SEPs. Where such a proposed SEP addresses the same pollutant(s) or same health effect(s) caused by the pollutant(s) at issue in the case, and will be implemented within a fifty-mile radius of the site of the violation, the SEP should satisfy the nexus requirement and confer the required environmental benefits.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution produced and released into the environment,

not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency and conservation in the use of energy, water, or other materials.[18]

C. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach which employs recycling, treatment, containment or disposal techniques may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as "pollution prevention." This type of SEP may include the installation of a more effective end-of-process control or treatment technology, improved containment, or safer disposal of an existing pollutant source. Pollution reduction also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for off-site production.

D. Environmental Restoration and Protection

An environmental restoration and protection project is one which enhances the condition of the ecosystem or immediate geographic area adversely affected by the violation.[19] These projects may be used to restore or protect natural environments and address environmental contamination and similar issues in man-made environments, and may include any project that protects the ecosystem from actual or potential damage resulting from the violation or that improves the overall condition of the ecosystem.[20] Examples of such projects include: restoration of a wetland in the same ecosystem along the same avian flyway in which the facility is located, or purchase and management of a watershed area to protect a drinking water supply where the violation (*e.g.*, a reporting violation) did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects which provide for the protection of endangered species (*e.g.*, developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation).

In some projects where the defendant has agreed to restore and then protect certain lands, the SEP may, under certain circumstances, include the creation or maintenance of certain recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided they do not impair the environmentally beneficial purposes of the project and they constitute only an incidental portion of the total resources spent on the project.

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[18] This is consistent with the Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101-13109) and the U.S. ENVTL. PROT. AGENCY, POLLUTION PREVENTION POLICY STATEMENT: NEW DIRECTIONS FOR ENVIRONMENTAL PROTECTION (June 15, 1993).

[19] If the EPA lacks authority to require repair of the damage caused by the violation, then repair itself may constitute a SEP.

[20] Simply preventing new discharges into the ecosystem, as opposed to taking affirmative action directly related to preserving existing conditions at a property, would not constitute a restoration and protection project, but may fit into another category, such as pollution prevention or pollution reduction.

For a project in which the parties intend that a property be protected so that the ecological and pollution reduction purposes of the land are maintained in perpetuity, the defendant may sell or transfer the land to another party with the established resources and expertise to perform this function, such as a state park authority. In some cases, the U.S. Fish and Wildlife Service or the National Park Service may be able to perform this function.[21]

With regard to man-made environments, such projects may involve the environmental remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and lead-based paint, which are a continuing source of releases and/or threat to individuals.

E. Assessments and Audits

There are three types of projects in the assessments and audits category: (1) pollution prevention assessments; (2) environmental quality assessments; and (3) compliance audits. These assessments and audits are only acceptable as SEPs when the defendant agrees to provide the EPA with a copy of the report and the results are made available to the public, except to the extent they constitute confidential business information (CBI) pursuant to 40 C.F.R. Section 2, Subpart B.

1. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production and generation of toxic and hazardous materials and other wastes. To be eligible as SEPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure. Pollution prevention assessments are acceptable as SEPs without an implementation commitment by the defendant where the case team determines that the SEP delivers other benefits worthy of SEP credit. Pollution prevention measures may be difficult to draft before the results of an assessment are known, and many of the implementation recommendations may constitute activities that are in the defendant's own economic interest and would not warrant SEP credit.

2. Environmental quality assessments are investigations of: the condition of the environment at a site not owned or operated by the defendant; the environment impacted by a site or a facility regardless of whether the site or facility is owned or operated by the defendant; or threats to human health or the environment relating to a site or a facility regardless of whether the site or facility is owned or operated by the defendant. Environmental quality assessments include, but are not limited to, investigations of levels or sources of contamination in any environmental media at a site and monitoring of the air, soil, or water quality surrounding a site or facility. Such monitoring

[21] Certain federal agencies have explicit statutory authority to accept gifts such as land, money, or in-kind services. All projects benefitting these federal agencies must be reviewed and approved in advance by the office of the chief legal counsel of the recipient agency for consistency with statutory authority.

activities are important as the data can empower over-burdened communities, and inform and enhance efforts to reduce potential environmental risks and hazards. To be eligible as SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken. An assessment without a commitment to address the findings of the assessment are permissible where the case team determines that the SEP delivers other benefits worthy of SEP credit. Expanded sampling or monitoring by a defendant of its own emissions or operations does not qualify as a SEP to the extent it is ordinarily available as injunctive relief.

Environmental quality assessment SEPs may not be performed: at sites that are on the National Priority List under Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9605, and 40 C.F.R. Part 300; at specific sites that the EPA has determined to be eligible for a Brownfields assessment grant under CERCLA Section 104(k)(2), 42 U.S.C. § 9604(k)(2); and at all other sites, for assessments that the EPA or another federal agency can perform under its own authority, that a defendant or another party could be ordered to perform under an EPA or other federally-administered authority, or that are otherwise required under federal law.

3. Environmental compliance audits are independent evaluations of a defendant's compliance status with environmental requirements at a given point in time. Credit is only given for the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since there is already a requirement to achieve and maintain compliance with environmental regulations. As most large companies routinely conduct compliance audits, mitigating penalties for such audits would reward violators for performing an activity that most companies already do. Audits may be less commonly done by small businesses or state or local governments, perhaps in part due to cost. In general, compliance audits are acceptable as SEPs only when the defendant is a small business, small community,[22] or a state or local government entity.[23]

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[22] For purposes of this Policy, a small business is owned by a person or another entity that employs 100 or fewer individuals. Small businesses could be individuals, privately held corporations, farmers, landowners, partnerships, and others. A small community is one comprised of fewer than 2,500 persons.

[23] *See* Memorandum from Phyllis P. Harris, Principal Deputy Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Clarification and Expansion of Environmental Compliance Audits Under the Supplemental Environmental Projects Policy* (Jan. 10, 2003).

F. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community in order to: (1) identify, achieve, and maintain compliance with applicable statutory and regulatory requirements or (2) go beyond compliance by reducing the generation, release, or disposal of pollutants beyond legal requirements. For these types of projects, the defendant may lack the experience, knowledge, or ability to implement the project itself and, if so, the defendant should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing a seminar directly related to correcting widespread or prevalent violations within the defendant's economic sector. Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements that were violated and where the EPA has reason to believe that compliance in the sector would be significantly advanced by the proposed project. For example, if the alleged violations involved Clean Water Act (CWA) pretreatment violations, the compliance promotion SEP must be directed at ensuring compliance with pretreatment requirements. Environmental compliance promotion SEPs require the special approvals described in Section XII.A.4.

G. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance, such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training, to a responsible state or local emergency response or planning entity. This assistance enables these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions, Local Emergency Planning Committees, and Local Fire Departments. EPCRA's reporting requirements enable states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment and the people that could be harmed by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations and there is no current federal financial assistance transaction that could fund the SEP. Further, this type of SEP is allowable only where the following violations are alleged in the complaint: violations of EPCRA; reporting violations under CERCLA Sections 103, 104(e) or 120, 42

U.S.C. §§ 9603, 9604(E), or 9620; violations of Section 112(r) of the Clean Air Act (CAA), 42 U.S.C. § 7412(r); or violations of other emergency planning, spill, or release requirements.

H. Other Types of Projects

Projects that do not fit within one of the seven categories above, but have environmental and/or public health benefits and are otherwise fully consistent with all other provisions of this Policy, are allowable as SEPs subject to the approval requirements in Section XII.A.4.

VI. PROJECTS NOT ACCEPTABLE AS SEPs

The following are examples of the types of projects that are not allowable as SEPs. This list is not exhaustive.

A. General public educational or public environmental awareness projects (*e.g.*, sponsoring public seminars, conducting tours of environmental controls at a facility, or promoting recycling in a community);

B. Contributions to environmental research at a college or university;

C. Cash donations to community groups, environmental organizations, state/local/federal entities,[24] or any other third party;[25]

D. Projects for which the defendant does not retain full responsibility to ensure satisfactory completion;

E. Projects which, though beneficial to a community, are unrelated to environmental protection (*e.g.*, making a contribution to a non-profit, public interest, environmental or other charitable organization, donating playground equipment, etc.);

F. Studies or assessments without a requirement to address the problems identified in the study (except as provided for in Section V.E above);

G. Projects which the defendant, SEP recipient, or SEP implementer will undertake, in whole or in part, with federal loans, federal contracts, federal grants, or other forms of federal financial assistance or non-financial assistance;

H. Projects that are expected to become profitable to the defendant within the first five years of implementation (within the first three years for SEPs implemented by defendants that are small businesses or small communities)

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[24] *See supra* footnote 21.

[25] Cash donations are prohibited because they may create the appearance of a diversion of penalty funds from the U.S. Treasury in violation of the Miscellaneous Receipts Act (MRA), 33 U.S.C. § 3302(b).

are prohibited. After that time period, profitable projects where the environmental or public health benefit outweighs the potential profitability to the defendant may be allowable under certain circumstances. (*See* Section XI.D, for additional information and requirements);[26]

I. Projects that provide raw materials only, with no commitment from the defendant for a completed project utilizing the raw materials (*e.g.*, donating rail ties and gravel for a fish ladder but not actually ensuring that the ladder is built);

J. Projects that are not complete, discrete actions with environmental or public health benefits;

K. Projects for which completion depends on the actions or contributions of individuals or entities that are neither party to the settlement nor hired by the defendant as an implementer;

L. Except in very limited circumstances, as described in Section XI.B, SEPs may not include actions that a third party is legally required to perform by any federal, state, or local law or regulation (also referred to as "third-party compliance" projects).

VII. COMMUNITY INPUT

In appropriate cases, the EPA should encourage input on project proposals from the local community that may have been adversely impacted by the violations. Case teams should encourage defendants to seek community input as early in the SEP development process as possible.[27] Ideally, community input should be sought by the defendant and the EPA collaboratively, but in some cases the EPA should consider seeking community input even in the absence of the defendant's participation (*e.g.*, cases in areas with environmental justice concerns). If a case team is aware of community interest in particular SEPs, the case team should feel free to share that information with the defendant. Soliciting community input during the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility.[28]

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[26] *See* Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects* (Dec. 5, 2003).

[27] In addition, in many civil judicial cases, the Department of Justice seeks public comment on lodged consent decrees through a Federal Register notice. 28 C.F.R. § 50.7. In certain administrative enforcement actions, there are also public notice requirements that are followed before a settlement is finalized. *See* 40 C.F.R. Part 22.

[28] *See* Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003). This guidance includes appendices suggesting potential techniques and resources for conducting community outreach.

Community involvement in SEPs may be most appropriate in cases where the range of possible SEPs is great and/or multiple SEPs may be negotiated.

Involving communities in consideration of SEPs enables the EPA and defendant to focus on the particular environmental priorities and concerns of a community, which is especially important if several different SEPs are being considered. The community also can be a valuable source of SEP ideas, including ideas that result in creative or innovative SEPs that might not otherwise have been considered.

Given the wide range of settlement scenarios, types of violations and communities, there are a number of factors that may help EPA staff determine whether or not community involvement may be appropriate in a particular case. Generally, these factors may include:

A. The specific facts and circumstances of each case (*e.g.*, court-ordered deadlines, imminent and substantial endangerment situations, etc.);

B. The willingness of the defendant to conduct a SEP;

C. The willingness of the defendant to solicit and respond in a meaningful way to community input;

D. The impact of the violations on the community, especially the community most directly affected by the facility's violations;

E. The level of interest of the community in the facility and the potential SEP; and

F. The amount of the proposed penalty and the settlement amount that is likely to be mitigated by the SEP.

Finally, SEPs are developed in the context of settlement negotiations. The EPA must carefully consider how to provide information to the public to facilitate its involvement in SEP consideration and development without undermining the non-public nature of settlement negotiations. Much of the information developed by the government may be privileged and therefore not appropriate for release to the public. In addition, a defendant may provide information to the government that must be kept confidential. For example, it may provide CBI to the EPA. CBI, by law, cannot be provided to the public.[29] Thus, each case will have limits on what information the EPA can make available to the public.[30] In judicial cases, DOJ will also retain authority to determine what information can be released to the community.

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[29] *See* 40 C.F.R. Part 2, Subpart B.

[30] *See* Memorandum from Granta Y. Nakayama, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Restrictions on Communicating With Outside Parties Regarding Enforcement Actions* (Mar. 8, 2006).

The extent of community input and participation in the SEP development process will vary with each case. Except in extraordinary circumstances and with the agreement of the parties, representatives of community groups will not participate directly in the settlement negotiations. This restriction is necessary because of the non-public nature of settlement negotiations. Although communities are generally not direct participants in settlement negotiations, appropriate outreach to affected communities (especially those with environmental justice concerns) regarding SEPs is encouraged, as this may better inform settlement negotiations.

VIII. EVALUATION CRITERIA

The EPA has identified several critical factors on which to evaluate proposed projects. SEP proposals should demonstrate that the project will effectively achieve or promote one or more of these overarching goals. The better the performance of the SEP under each of these factors, the higher the appropriate mitigation credit should be. Appropriate mitigation of the civil penalty for implementation of a SEP will be determined by the EPA based on these factors and other case-specific considerations.

A. Significant, Quantifiable Benefits to Public Health and/or the Environment

While all SEPs must benefit public health and/or the environment, SEPs that perform well on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and reduction in risk to public health. SEPs also will perform well on this factor to the extent they result in significant and, to the extent possible, measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats), and promoting more resilient communities, infrastructure and ecosystems in the face of climate change.

B. Environmental Justice

SEPs that perform well on this factor will mitigate damage or reduce risk to a community that may have been disproportionately exposed to pollution or is at environmental risk.

C. Community Input

SEPs that perform well on this factor will have been developed taking into consideration input received from the affected community. Projects developed with active solicitation and consideration of community input are preferred.

D. Innovation

SEPs that perform well on this factor will further the development, implementation, or dissemination of innovative processes, technologies, and/or methods which more effectively: reduce the generation, release, or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; promote compliance; or improve climate change preparedness and resilience. This includes technology-forcing techniques which may establish new regulatory benchmarks.

E. Multimedia Impacts

SEPs that perform well on this factor will reduce emissions to more than one medium and ensure that pollutant reductions are not being achieved by transferring pollutants from one medium to another.

F. Pollution Prevention

SEPs that perform well on this factor will develop and implement pollution prevention techniques and practices that reduce the generation of a pollutant.

IX. CALCULATION OF THE FINAL SETTLEMENT PENALTY

A primary incentive for a defendant to propose a SEP is the potential mitigation of its civil penalty. In settling enforcement actions, the EPA requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. The EPA also seeks substantial penalties in order to deter noncompliance. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and other members of the regulated community. Penalties help maintain a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Thus, any mitigation of penalties must be carefully considered.

A. Components of the Settlement Penalty

Statutes administered by the EPA generally contain penalty assessment criteria that a court or administrative law judge must consider in determining an appropriate penalty during a trial or hearing. In the settlement context, the EPA follows these criteria, and program- or media-specific penalty policies based on the statutory criteria, in exercising its discretion to establish an appropriate penalty for purposes of settlement (settlement penalty). In calculating an appropriate penalty, the EPA considers factors such as the economic benefit associated with the violations, the gravity or seriousness of the violations and the violator's prior history of noncompliance.

Settlements that include a SEP must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s).

SEPs are not penalties, nor are they accepted in lieu of a penalty. However, a violator's commitment to perform a SEP is a relevant factor for the EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP, compared to the violator who does not.

B. Minimum and Maximum Penalty Requirements When SEPs Are Included in Settlement

1. Minimum Penalty Requirements

Settlements that include a SEP must always also include a penalty. In settlements in which defendants commit to conduct a SEP, the final settlement penalty must equal or exceed either:

a. The economic benefit of noncompliance plus ten percent (10%) of the gravity component; or

b. Twenty-five percent (25%) of the gravity component only; whichever is greater.

2. Exceptions to the Minimum Penalty Requirements

For certain types of settlements the minimum penalty required by the statutory penalty policy, or allowed by special exception, differs from the minimum penalty requirements of this Policy.

a. Clean Water Act Settlements with Municipalities using the NMLC

The EPA's Interim Clean Water Act Settlement Penalty Policy (Mar. 1, 1995) (CWA Penalty Policy) applies to civil judicial and administrative penalties sought under Sections 309(d) and (g) of the CWA, 33 U.S.C. §§ 1319(d) and (g), including violations of Sections 301, 307, 308, 309(a) and 405, 33 U.S.C. §§ 1311, 1317, 1318, 1319(a) and 1345. The CWA Penalty Policy sets forth how the Agency generally exercises its prosecutorial discretion in deciding on an appropriate enforcement response and determining an appropriate settlement penalty. In cases with a municipality or other public entity (such as a sewer authority) for violations of the CWA, the Agency may provide for substantially reduced penalties based on the CWA Penalty Policy's national municipal litigation considerations (NMLC).

The NMLC provisions are designed to take into account a number of different criteria unique to municipalities and are intended to recognize and account for the special circumstances faced by municipalities when settling CWA matters. However, the NMLC does not provide separate economic benefit and gravity amounts, so the analysis required to determine the minimum SEP penalty as provided above cannot be performed when using NMLC penalties. Additionally, due to the high capital costs and correspondingly high amount of economic benefit that are typical in such cases involving municipalities, if the minimum SEP penalty were calculated based on the actual economic benefit amount, the

resulting minimum penalty that would be required under the SEP policy would be greater than the entire NMLC-based penalty and would thus preclude any SEPs in municipal cases with an NMLC penalty. Consequently, to ensure that SEPs can be included in settlements with municipalities when using the NMLC, the minimum penalty requirements as provided above do not apply, and a municipality continues to be eligible to mitigate up to 40% of the penalty for a SEP, as provided for in the CWA Penalty Policy.[31]

b. Toxic Substances Control Act (TSCA) Settlements and Lead-Related SEPs

In administrative settlements resolving violations of TSCA Sections 402, 404 and 406(b), 15 U.S.C. §§ 2682, 2684 and 2686(b), and Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852(d), which include SEPs, respondents are eligible for a reduced minimum settlement penalty where the SEP is a lead-based paint abatement or blood lead level screening project and/or treatment, and where Medicare coverage is not available. In such cases, the minimum settlement penalty may be reduced: in Section 402, 404, and 406(b) settlements, to ten percent (10%) of the gravity-based penalty plus any economic benefit; and in Section 1018 settlements, to ten percent (10%) of the gravity portion of the penalty. These exceptions are not mandatory and may not be appropriate in all cases.[32]

3. Statutory Maximum Penalty Limits

In administrative enforcement actions in which there is a statutory limit (commonly called a "cap") on the total maximum penalty that may be sought in a single action, the penalty to be paid shall not exceed that limit. SEPs are not penalties, so the cost of the SEP is not included in the administrative cap.

C. Mitigation of the Penalty When SEPs Are Included in Settlement

1. General Approach to Penalty Mitigation

Penalty mitigation for performance of a SEP is considered only after all other appropriate mitigation factors in the applicable penalty policies have been applied and a bottom-line settlement penalty determined.

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[31] *See* INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY, at 22 (Mar. 1, 1995).

[32] *See* Memorandum from Thomas V. Skinner, Acting Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases* (Nov. 23, 2004); Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Exception to the Minimum Penalty Requirements for Proposed Supplemental Environmental Projects in Administrative Matters Resolving Violations of TSCA Sections 402, 404 and 406(b)* (Dec. 14, 2012).

The amount of penalty mitigation given for a SEP should be equivalent to a percentage of the estimated cost to implement the SEP and should not exceed eighty percent (80%) of that estimated cost.

The EPA will consider a variety of factors in determining the amount of penalty mitigation including, but not limited to, the evaluation criteria described in Section VIII of this Policy. Penalty mitigation in light of a SEP is within the EPA's discretion; there is no presumption as to the correct amount of mitigation.

For any SEP where the government must allocate significant resources to monitor and review the implementation of the project, those resources should be taken into consideration when determining the appropriate penalty mitigation amount. In such instances, a penalty mitigation amount that is lower than the maximum allowable for that type of SEP may be more appropriate.

2. Exceptions to General Penalty Mitigation Approach

   a. For defendants that are small businesses, government agencies or entities, or non-profit organizations, the penalty mitigation amount may be set as high as one hundred percent (100%) of the estimated SEP cost, if the defendant can demonstrate the project is of outstanding quality.[33]

   b. For any defendant, if the SEP implements pollution prevention technologies or practices which reduce or eliminate the generation of a pollutant at its source, the penalty mitigation credit may be set as high as one hundred percent (100%) of the estimated SEP cost, if the defendant can demonstrate the project is of outstanding quality.

   c. Where a SEP provides significant benefits to a community with environmental justice concerns, case teams should be willing to consider, in consultation with OECA's National SEP Policy Coordinators, giving higher penalty mitigation credit for projects of outstanding quality.

   d. Penalty mitigation credit for SEPs that are profitable should be limited to:

      i. Eighty percent (80%) for pollution prevention projects; and

      ii. Sixty percent (60%) for all other types of projects. (*See* Section XI.D for additional guidance.)

[33] Outstanding quality may be based on how well a SEP meets and exceeds one or more of the evaluation criteria described in Section VIII, as well as on relevant case-specific factors.

X. REQUIREMENTS FOR SETTLEMENTS THAT INCLUDE A SEP

A. SEP Description

The settlement agreement must accurately and completely describe the SEP. It must describe the specific actions to be performed by the defendant, and should include a completion deadline and, where appropriate, interim milestones for long-term or complex SEPs, as well as a detailed cost estimate. The defendant should also be required to provide documentation supporting its cost estimate. Negotiating teams should determine what potential SEP costs are not eligible for inclusion in the cost estimate on which the penalty mitigation is based. Examples of costs to consider that are generally not appropriate for inclusion include: overhead; additional employee time and salary; administrative expenses; most legal fees; and contractor oversight. If the defendant is unable or unwilling to provide documentation supporting its cost estimate, the SEP should not be accepted. The settlement agreement should also include a reliable and objective means to verify that the defendant has completed the project on time and in a satisfactory manner. For complex or long-term SEPs, including a requirement for the defendant to submit periodic status reports is recommended.

B. SEP Certifications

In all settlements with SEPs, the defendant must make a number of certifications. The following language should be included in the settlement document:

> *With regard to the SEP, Defendant certifies the truth and accuracy of each of the following:*
>
> *a. That all cost information provided to the EPA in connection with the EPA's approval of the SEP is complete and accurate and that Defendant in good faith estimates that the cost to implement the SEP[, exclusive of _____ costs,] is $_____;*
> *b. That, as of the date of executing this Decree, Defendant is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;*
> *c. That the SEP is not a project that Defendant was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;*
> *d. That Defendant has not received and will not receive credit for the SEP in any other enforcement action;*
> *e. That Defendant will not receive reimbursement for any portion of the SEP from another person or entity;*

f. That for federal income tax purposes, Defendant agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP; [34]

g. Augmentation Certification (see Section IV.C);and

h. Diesel Emissions Reduction SEP Certification (where applicable, see Section IV.D).

C. Disclosure of Enforcement Settlement Context

Further, the defendant must agree that whenever it publicizes a SEP or the results of a SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action. The settlement document should also include the following provision:

> *Any public statement, oral or written, in print, film, or other media, made by Defendant making reference to the SEP under this Agreement/Decree from the date of its execution of this Agreement/Decree shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action United States v. Defendant, taken on behalf of the U.S. Environmental Protection Agency to enforce federal laws."*

D. SEP Completion Report

The settlement agreement should require submission of a final SEP completion report from the defendant. This report should be certified by an appropriate corporate official acceptable to the EPA. At a minimum, the report should provide evidence of SEP completion (which may include, but is not limited to, photos, vendor invoices or receipts, correspondence from SEP recipients, etc.) and document all SEP expenditures. To the extent feasible, defendants should be required to quantify the benefits associated with the project and provide the EPA with a report setting forth how the benefits were measured or estimated. Additional requirements may be necessary, depending on the nature of the SEP.

E. Liability for Performance/Third-Party Involvement in SEPs

Defendants may not simply provide funds to a third-party SEP implementer or SEP recipient (*see* Sections VI.B and C). Defendants must remain responsible for ensuring that a SEP is completed satisfactorily (*see* Section VI.D). A defendant may not transfer this responsibility to any other party.

1. Third-Party SEP Implementers

Defendants may use third parties, including contractors, to assist with the implementation of a

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[34] *See* Memorandum from Granta Y. Nakayama, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Advisory Memorandum on Internal Revenue Service Directive Regarding the Deductibility of Supplemental Environmental Projects* (Dec. 21, 2007).

SEP.[35] However, the settlement document (including any appendices) should not require the defendant to select a particular third party to assist in implementing the SEP because, as noted in Legal Guideline IV.B.1.b, this could be perceived as the EPA managing or directing the SEP. It could also appear to provide a competitive advantage or preferential treatment to the third party. In some instances, it may be appropriate for the EPA to define criteria or qualifications that potential SEP implementers must meet. In that event, the EPA may reject a SEP if the SEP implementer selected by the defendant does not meet the required criteria (*e.g.*, a contractor that is not sufficiently experienced or is not properly certified to perform the work required).

The settlement document may identify a SEP implementer chosen by the defendant and, in that case, the agreement should explicitly note that the implementer was chosen by the defendant. The settlement document should not include any agreements made between the defendant and the SEP implementer (including which elements of the SEP the implementer will perform) because inclusion of detailed agreements between the violator and a third party could create ambiguity about who is responsible in the event of nonperformance of the SEP. The defendant is responsible for the satisfactory completion of the SEP and cannot transfer that responsibility to a third party. Therefore, the agreement should spell out the activities to be performed, in as much detail as necessary for the particular SEP. However, any agreements between the defendant and implementer about how the SEP will be accomplished should not be part of the settlement agreement.

To avoid ambiguity, enhance enforceability, avoid the appearance of augmentation or that the EPA is managing the SEP and to avoid ethical issues with regard to third parties, settlement documents may include language such as:

a. *Defendant may use a contractor/consultant to implement the SEP;*

b. *Defendant has selected (name of contractor/consultant or SEP implementer) as a contractor/consultant to assist with implementation of the SEP;*

c. *The contractor/consultant chosen by Defendant must meet the following criteria [define criteria in terms of qualifications, experience, knowledge of particular geographic area or ecosystem, etc.]; and/or*

d. *Defendant shall provide the EPA with notice of the contractor/consultant and the EPA has the right to disapprove a SEP implementer if it does not meet the required criteria.*

2. Third-Party SEP Recipients

The settlement document should not require the defendant to select or identify a particular third-party recipient for the SEP, as this could similarly be perceived as the EPA managing the SEP and/or providing an unfair competitive advantage or preferential treatment to the recipient. The

[35] Non-profit organizations, such as universities and public interest groups, may function as contractors or consultants.

settlement document may, however, identify a SEP recipient selected by the defendant.

In some instances, it may be appropriate for the EPA to define criteria or qualifications that potential SEP recipients must meet. In that event, the EPA may reject a SEP if the SEP recipient selected by the defendant does not meet the required criteria (*e.g.*, the EPA may reject a SEP where the recipient is a land trust that is financially incapable of preserving and maintaining land donated by the defendant).

Settlement documents may include language such as:

a. *Defendant has selected (name of SEP recipient) to receive SEP [define activity, service, or product to be provided to SEP recipient];*

b. *The SEP recipient chosen by Defendant must meet the following criteria [define criteria in terms of qualifications, experience, knowledge of particular geographic area or ecosystem, etc.];*

c. *Defendant shall provide the EPA with notice of the SEP recipient and the EPA has the right to disapprove the SEP if the recipient does not meet the required criteria.*

F. Failure to Satisfactorily Complete a SEP and Stipulated Penalties

Defendants who agree to perform a SEP as part of an enforcement settlement will generally pay a smaller penalty than if the settlement does not include a SEP. Thus, it is important that the SEP be completed in a timely and satisfactory manner, to ensure that the EPA and the public receive the benefits expected from the SEP. Therefore, stipulated penalty liability for failure to adequately perform or complete a SEP should always be included in the settlement document and be established as appropriate to the individual case.

1. Stipulated Penalty Provisions in the Settlement Document

The settlement document should provide stipulated penalties for failure to satisfactorily complete a SEP, based on the description of the SEP and definition of satisfactory completion in the settlement document. As noted in Sections IV.A.4 and X.A, the SEP description provided by the defendant should be as detailed and clear as possible, in terms of specific activities, actions, and/or anticipated results. The settlement agreement should clearly define satisfactory completion of the SEP in terms of such activities, actions and/or anticipated results, so that all parties understand the terms on which satisfactory completion will be judged.

The definition of satisfactory completion may include a commitment to expend an agreed-upon amount on performance of the SEP. The defendant's estimation of the SEP cost and commitment to expend a certain amount on the SEP can help the case team properly assess the scope and scale of the SEP and ensure that any penalty mitigation based on its performance is appropriate.

However, with rare exceptions, expenditure of funds should not be the sole parameter on which satisfactory completion is to be determined.[36]

The settlement agreement should also include a deadline for final completion of the SEP. For very large or complex SEPs, or SEPs with extended implementation schedules, it is strongly recommended that defendants be required to submit a SEP workplan that includes specific actions to be taken, interim milestones (where appropriate), a final completion date and cost estimates.

Stipulated penalty provisions in the settlement document may be structured to include daily or one-time lump-sum penalties, or a combination of both, as deemed appropriate by the case team. For example:

a. For failure to meet interim milestones, to submit required progress reports, and/or to provide a SEP completion report, daily penalties may be appropriate.

b. For failure to satisfactorily complete the SEP as described (including situations where the EPA deems the SEP to have been abandoned by the defendant and situations where the SEP has not been satisfactorily completed because the defendant has not expended the agreed-upon SEP cost), either daily or lump-sum penalties may be appropriate.

c. Lump-sum stipulated penalties for failure to complete the SEP must exceed the estimated cost of the SEP. Stipulated penalties that exceed the estimated cost of the SEP provide an incentive to the defendant to complete the SEP satisfactorily and ensure that the EPA receives the full benefit of the settlement.

In judicial settlements, where SEPs are often larger projects with extended implementation schedules, stipulated penalty liability for failure to satisfactorily complete a SEP should generally be structured as daily penalties, in the same manner as stipulated penalty liability for failure to complete required injunctive relief. This will help ensure that the SEP is being implemented in a timely and satisfactory manner, according to the schedule/workplan submitted by the defendant as part of the SEP description. For small, easy-to-implement SEPs, the alternative of a lump-sum penalty that exceeds the SEP cost may also be appropriate.

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[36] Consultation with the appropriate OECA National SEP Policy Coordinators is recommended at the drafting stage in situations where a case team believes that the only means for defining satisfactory completion of a SEP is through expenditure of an agreed-upon amount. In most cases, the defendant should be able to identify a minimum activity or number of actions that can be the basis of satisfactory completion. For instance, in land purchase/conservation SEPs, the purchase of a minimum amount of acreage should be required, even where market fluctuations make it difficult to determine the exact amount of land that can be purchased for the SEP cost. Similarly, for example, in settlements where the SEP involves diesel retrofits, a minimum number of retrofits should be required. If the defendant is not able to clearly define the SEP so that it is not possible to agree upon what constitutes "satisfactory completion," the SEP may not be appropriate to pursue.

2. Assessment of Stipulated Penalties

The assessment of stipulated penalties is always at the EPA's discretion. Therefore, it is appropriate to include the following in settlement documents:

> *The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Decree/Consent Agreement.*

Where appropriate, settlements may also include provisions for reducing or waiving stipulated penalties to address certain situations where discretion may be desired. Examples of such situations include:

a. Where all elements of a SEP have been satisfactorily completed, but the defendant has expended less than the agreed-upon amount on the SEP, the EPA may, in its discretion, choose to reduce or waive stipulated penalties otherwise due under the settlement agreement.

b. Where a SEP has not been satisfactorily completed, but the defendant can demonstrate that the partially completed SEP provides some of the expected environmental and/or public health benefits, the EPA may, in its discretion, choose to reduce or waive stipulated penalties otherwise due under the settlement agreement.

c. Where a fully completed SEP does not produce the environmental or public health results required by the agreement, the enforcement case team may, in its discretion, deem the SEP satisfactorily completed and choose to reduce or waive stipulated penalties otherwise due under the settlement agreement. This may occur when a SEP is being implemented to test a new technology or process, or where circumstances beyond the defendant's control have had an impact on the results.

Consultation with the appropriate Headquarters enforcement division director is recommended prior to waiving or reducing stipulated penalties, to ensure consistency across settlements.

3. Dispute Resolution

Settlements including SEPs may include provisions for dispute resolution over determination of whether the SEP has been satisfactorily completed, pursuant to the terms of the agreement.

XI. SPECIAL SITUATIONS AND ISSUES

A. Accelerated Compliance SEPs

Accelerated compliance SEPs include activities that a defendant will become legally obligated to undertake two or more years in the future. Such projects are acceptable as SEPs provided the

project will result in the facility coming into compliance at least two years prior to the effective date of the requirement. Accelerated compliance projects are not allowable, however, if the regulation or statute provides a benefit (*e.g.*, a higher emission limit) to the defendant for early compliance.

B. Third-Party Compliance Projects

Activities that are legally required of any party are generally prohibited as SEPs. Under some circumstances, however, an exception may be appropriate, but requires prior Headquarters approval from the appropriate media enforcement division director in OECA (*see* Section XII.A.5). Exceptions to this prohibition have been granted where:

1. The SEP involves a defendant's implementation of an activity that is legally required of residents of a community with environmental justice concerns (*e.g.*, maintaining or establishing connection to a sewer lateral line);

2. The residents are financially unable to comply with the legal requirement; and

3. The SEP provides significant public health and/or environmental benefits.

A specific exception has been made for chemical clean-out projects in schools. Although schools may be required to manage chemicals and hazardous wastes appropriately, many lack the skills and resources to do so. SEPs that identify, remove and properly dispose of hazardous chemicals from schools are acceptable under certain conditions, given their impact on children's health and communities with EJ concerns. Such projects may be acceptable when:

1. The recipient school is a primary or secondary public school;

2. The project provides a one-time identification, removal, and proper disposal of chemicals and/or hazardous wastes; and

3. The project includes a beyond-compliance component, such as establishing a chemical tracking system.

As with all third-party compliance projects, prior Headquarters approval from the appropriate media enforcement division director in OECA is required (*see* Section XII.A.5).

C. Environmental Management Systems (EMS)

EMSs are formal facility or corporate-wide plans and systems for ensuring current and future compliance with environmental requirements. EMSs describe the organizational structure and responsibilities of management and staff in ensuring environmental compliance. They also describe standard operating practices and procedures for the facility/company and identify processes and resources for developing, implementing, achieving, reviewing and maintaining the environmental policy of the company. An EMS is more than a statement by the organization of its intentions and principles in relation to its overall environmental performance; it also provides

a framework for action for the company to set and meet its environmental objectives and targets. EMSs are allowable as SEPs only for small businesses. For large businesses with multiple environmental requirements, EMSs are more appropriate as part of the injunctive relief sought for environmental violations. Case teams considering EMSs proposed as SEPs by a large business must seek prior approval from the Director of the Special Litigation and Projects Division (SLPD) in OCE before accepting the SEP, per the special approval requirements for "Other" SEPs in Section XII.A.4.[37]

D. Profitable SEPs

Certain types of beneficial projects, such as pollution prevention or innovative technology projects, may ultimately be profitable to the defendant, and may well be actions it would have undertaken on its own for economic business reasons. SEPs are, by definition, projects that would not have occurred "but for" the settlement of an enforcement action, and the associated mitigation of a penalty. In almost all cases, providing penalty mitigation for SEPs that are inherently profitable would undermine the deterrent value of penalties, as well as contribute to "un-leveling the playing field" between violators and their competitors who stayed in compliance with the law.

However, in some instances the EPA may consider a SEP's environmental and/or public health benefits sufficiently compelling that a "profitable" SEP could nevertheless be approved. In addition, the potential positive returns for some innovative projects may be so speculative that a defendant, especially if it is a small business or community, would hesitate to pursue them outside of the enforcement settlement.

Thus, consistent with the criteria below, for defendants that are small businesses or small communities, projects that will become profitable after the first three years of implementation are allowable as SEPs. For all other entities, only projects that will become profitable after the first five years of implementation are allowable as SEPs.[38]

To be allowable, such projects must, of course, meet all the terms and conditions of this Policy and, because such projects provide benefits to the defendant as well as to the environment or public health, these projects must demonstrate:

1. A high degree of innovation (*e.g.*, projects that use new technologies or processes not commonly in use by the industry or sector) with the potential for widespread application;

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[37] *See* Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects* (June 12, 2003).

[38] *See* Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects* (Dec. 5, 2003).

2. Technology that is transferable to other facilities or industries, with a defendant that agrees to share information about the technology;

3. Extraordinary environmental benefits that are quantifiable (*e.g.*, project will result in measurable reductions in air pollutant emissions or measurable improvement in water quality);

4. Exceptional environmental and/or public health benefits to a community with environmental justice concerns; and/or

5. A high degree of economic risk for the alleged violator.

The EPA's economic model, PROJECT, provides useful information about the net present value of SEP expenditures and its use is recommended in order to assess whether a proposed project may be profitable to the defendant. Because a defendant will benefit from the implementation of a profitable SEP, it is not appropriate for such SEPs to receive the maximum allowable penalty mitigation. Regions should consider how well the project meets the above criteria, the length of time before the project becomes profitable, and the degree of profit. Projects that become profitable early on or show a significant profit should receive a lower amount of penalty mitigation as described in Section IX.C.2.d.

E. SEPs in Ability-to-Pay (ATP) Settlements

In certain settlements, the EPA may determine that the defendant is unable to pay the full amount of the settlement penalty. The defendant's ability to pay (ATP) can be determined using the EPA's financial models: ABEL or INDIPAY (if the defendant is an individual).[39] Using financial information provided by the violator, these models evaluate a defendant's ability to afford compliance costs, clean-up costs, or civil penalties. In more complex scenarios, a violator's ATP may be evaluated by financial analysis experts using other methods.

In situations where the defendant is unable to pay the full settlement penalty, a SEP may be included in the settlement only in certain circumstances:

1. The defendant must be able to pay the minimum penalty required by the SEP Policy. The required minimum penalty, as described in Section IX.B.1, must be determined before the settlement penalty is reduced based on ATP considerations.

2. For global/multiple settlement initiatives with unique penalty calculations, the defendant must be able to pay the minimum penalty required under the initiative's settlement construct.

3. Penalty calculations in ATP cases where SEPs are considered typically result in the need to allow one hundred percent (100%) credit for the SEP.

[39] Available at http://www2.epa.gov/enforcement/penalty-and-financial-models.

Therefore, the project must be of outstanding quality and meet at least one of the SEP Policy exceptions for one hundred percent (100%) mitigation credit (*see* Section IX.C.2).

4. SEPs in ATP cases should be considered only where the defendant has demonstrated the capacity to effectively manage and implement a SEP.

F. Aggregation/Consolidation of SEPs by Defendants[40]

Where several defendants are settling separate cases for similar violations in the same general geographic area and at approximately the same time, the aggregation of SEPs could be considered.

1. Where Defendants Are Jointly and Severally Liable for Performance of Consolidated SEPs

The aggregation of SEPs where the defendants are jointly and severally liable for the completion of the consolidated project may be acceptable if the settlements are crafted carefully. For instance, defendants may propose pooling resources to hire a contractor to manage and/or implement a consolidated SEP. Such an approach could be acceptable if the defendants each remain liable under their separate settlement agreements to perform the consolidated project in the same manner as they would under a typical settlement. Defendants are generally held accountable through the inclusion of stipulated penalties, should the SEP not be completed as agreed upon.

2. Performance of Complementary, Segregable SEPs

Another potentially acceptable approach is to allow defendants in separate cases to perform discrete and segregable tasks within a larger project. Such an approach must meet the following conditions to address potential concerns relating to the Miscellaneous Receipts Act (MRA):

a. Each discrete project must have a nexus to the violations at issue in the particular settlements and meet all conditions of the SEP Policy;

b. Each discrete project must itself be worthwhile with environmental or public health benefits;

c. The settlement must hold each defendant responsible for implementation and completion of a specific portion of the larger project; and

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[40] *See* Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance Concerning the Use of Third Parties in the Performance of SEPs and the Aggregation of SEP Funds* (Dec. 15, 2003).

d. The segregable pieces must not be dependent on each other. If the settlements are structured carefully, such an approach can result in significant environmental or public health benefits that might otherwise be unavailable.

3. Other Considerations

While the aggregation of SEPs under these scenarios can be designed, as described above, to avoid MRA concerns, other practical implementation issues need to be considered in addition to those set forth above. For example, aggregation of SEPs in this manner may require that all settlements be completed at approximately the same time and that defendants in separate settlements are willing to cooperate with one another, because they are all responsible for completion of the entire project.

4. Consultation with OECA's National SEP Policy Coordinators

Regions should consult with the National SEP Policy Coordinators in OCE early in the process when considering proposals by defendants to aggregate or coordinate SEPs. When the settlement involves a federal agency, the consultation should be with the Federal Facilities Enforcement Office (FFEO) in OECA. Similarly, if the case involves a CERCLA violation by a non-federal responsible party, the consultation should be with the Office of Site Remediation Enforcement (OSRE) in OECA.

G. Aggregation of SEP Funds by the EPA[41]

Federal appropriations law and principles, including the MRA, restrict the Agency's ability to establish SEP accounts or otherwise manage SEP funds. EPA may not establish accounts for pooling SEP funds from multiple defendants to apply towards projects that would be too large or too expensive for a single defendant to complete. In other words, the EPA may not hold or manage SEP funds from several settlements that would otherwise have been used by defendants for SEP projects in each individual enforcement settlement. Establishing a SEP account for which the Agency manages SEP funds and determines how the funds are to be spent would amount to an augmentation of appropriations.

H. Acceptance of a SEP in Lieu of Stipulated Penalties

Stipulated penalties are an important tool in ensuring consent decree (CD) and settlement agreement compliance. Both the amount and the certainty of assessment should act as a strong deterrent for noncompliance. Where penalties have been stipulated for violations of CDs or other settlement agreements, those penalties may not be mitigated by the use of SEPs, or converted into a project.[42] However, future CDs or settlements may be crafted to stipulate that a defendant

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[41] *See id.*

[42] The Assistant Administrator for OECA may consider mitigating potential stipulated penalty liability using SEPs where: (1) despite the circumstances giving rise to the claim for stipulated penalties, the violator has the ability and intention to comply with a new settlement agreement obligation to implement the SEP; (2) there is no negative impact on the deterrent purposes of stipulated penalties; and (3) the settlement agreement establishes a range for

will perform a particular SEP in addition or as an alternative to paying specified penalties, in the event of noncompliance with specified requirements.[43] Such stipulated SEPs may provide significant benefits to affected communities and are encouraged.

XII. EPA PROCEDURES FOR SEP APPROVAL AND DOCUMENTATION

A. Approvals[44]

The authority of a government official to approve a SEP is included in the official's authority to settle an enforcement case and thus, subject to the exceptions set forth here, no special approvals are required. Special approvals and consultations, however, are required for both administrative and judicial enforcement actions as follows:

1. If a proposed SEP will be implemented in more than one Region, the case team negotiating the settlement should notify the Enforcement and SEP Coordinators in the other affected Regions and provide a written description of the proposed SEP to allow an opportunity for review and comment.

2. In all cases including a SEP which may not fully comply with the provisions of this Policy (*e.g.*, the proposed settlement penalty is less than the minimum required penalty), except for the third-party compliance SEPs described in Section XII.A.5 below, the settlement and the SEP must be approved by the Assistant Administrator for OECA.

   The case team must prepare a request for approval that sets forth its legal analysis supporting the conclusion that the project is within the EPA's legal authority and is not otherwise inconsistent with applicable law. The request for approval should describe the violations being resolved and the terms of the proposed settlement, and provide a justification for deviating from the provisions of this Policy. The request for approval should be submitted to the Assistant Administrator for OECA through the Director of OCE. If the settlement involves a federal agency, the request for approval should be submitted through the Director of FFEO. Similarly, if the case involves a

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stipulated penalty liability for the violations at issue. For example, if a defendant has violated a settlement agreement that provides that a violation of X requirement subjects it to a stipulated penalty between $1,000 and $5,000, then the Agency may consider SEPs in determining the specific penalty amount that should be demanded. Any SEP used to mitigate a stipulated penalty must have nexus to the action or inaction that gave rise to the penalty.

[43] Such stipulated SEPs must be fully identified and set forth in a final settlement agreement (*i.e.*, to the same extent and level of detail as any other SEP) and must meet all the requirements of this Policy. A later amendment to a final settlement agreement may also include such stipulated SEP(s), as follows: (1) for noncompliance with the new requirements added by the amendment; or (2) for noncompliance with certain, specified requirements that were part of the original agreement, provided that the defendant is and has been in compliance with the terms of the original consent decree or agreement (both before and during the drafting of the amendment) to which the stipulated SEP would apply.

[44] This supersedes and replaces Memorandum from Eric V. Schaeffer, Dir., Office of Regulatory Enforcement, U.S. Envtl. Prot. Agency, *Revised Approval Procedures for Supplemental Environmental Projects* (July 21, 1998).

CERCLA violation by a non-federal responsible party, then the request for approval should be sent through the Director of OSRE.

Consultation with OCE's National SEP Policy Coordinators is recommended prior to submission of a request for approval from the Assistant Administrator for OECA. If the settlement involves a federal agency, the consultation should be with FFEO. If the settlement involves a CERCLA violation by a non-federal responsible party, the consultation should be with OSRE.

3. In all cases in which a SEP would involve activities outside the United States and territories, the SEP must be approved in advance by the Assistant Administrator for OECA and, for judicial settlements, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice.

4. In all cases in which an environmental compliance promotion project or a project in the "Other" category is contemplated (*see* Sections V.F and H, and Section XI.C), the project must be approved in advance by the appropriate enforcement division director in OECA after consultation with the National SEP Policy Coordinators in OCE or, as appropriate, FFEO or OSRE.

5. In all cases in which the proposed SEP will implement the legal requirement of a third party (*see* Section XI.B), in order to protect the integrity of the media enforcement program, the project must be approved in advance by the appropriate enforcement division director in OCE or, as appropriate, FFEO or OSRE.

B. Documentation and Confidentiality

In each case in which a SEP is included as part of a settlement, a justification for inclusion of the SEP and any supporting materials must be included as part of the case file. The SEP justification should explain the criteria used to evaluate the project and include a description of the expected benefits associated with the SEP. The justification must include a description by the enforcement attorney of how nexus and the other legal guidelines are satisfied.

Documentation and explanations of a particular SEP may constitute confidential settlement information that is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, is outside the scope of discovery, and is protected by various privileges, including the attorney-client privilege and the attorney work-product privilege. While Agency evaluations of proposed SEPs are generally privileged documents, this Policy is a public document and may be released to anyone upon request.

Appendix A

AUGMENTATION OF APPROPRIATIONS:
REASONABLE INQUIRY REGARDING FEDERAL APPROPRIATIONS[1]

I. EPA's Role and Responsibilities:

The EPA will determine that a proposed SEP does not:

1. Provide the EPA with additional resources to perform a particular activity for which it has received a specific appropriation, meet a statutory obligation, or circumvent a statutory prohibition;

2. Provide additional support for a project managed by the EPA or another federal agency;

3. Provide additional resources to perform work on federally-owned property; or

4. Augment an "open federal financial assistance transaction" between the EPA and the defendant, any third-party SEP recipient, or any third-party SEP implementer that is funding or could fund "the same activity as the SEP."

- If the SEP would do any of the above, it cannot be approved.

See Section IV of this Appendix for step-by-step instructions on making these determinations.[2]

II. Defendant's Roles and Responsibilities:

The defendant will:

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[1] This appendix provides case teams with assistance in ensuring that proposed SEPs meet the conditions of Legal Guidelines in Section IV.B.2, Federal Appropriations and Federally-Performed Activities, and Section IV.C, Augmentation: Reasonable Inquiry and Certification.

[2] In the context of federal facilities enforcement, the EPA must also determine whether a proposed SEP presents an augmentation issue. However, because there are fiscal and appropriations law issues and statutory authorities for agency action that are unique to the federal facilities context, the EPA's inquiry differs from the process set forth in this document. Federal agencies must comply with the Purpose Statute, 31 U.S.C. § 1301(a), in expending their appropriations. Any time a federal agency respondent agrees to perform a SEP, the federal agency should make a determination that it has the authority to use its appropriations to perform the SEP. The Federal Facilities Enforcement Office (FFEO), Office of Civil Enforcement, and Office of General Counsel intend to develop a short checklist, much like this one, to assist federal facilities case teams. In the meantime, for assistance in evaluating augmentation issues in a federal facilities enforcement case, please contact FFEO's SEP coordinator.

1. Determine whether, and certify that it does not, have an "open federal financial assistance transaction" with the EPA or any other federal agency that is funding or could fund "the same activity as the SEP";[3] and

2. Ask, and certify that it has asked, any SEP recipient or third-party SEP implementer whether that entity does or does not have an "open federal financial assistance transaction" with the EPA or any other federal agency that is funding or could fund "the same activity as the SEP."

- Where the defendant, SEP recipient, or third-party SEP implementer has an open federal financial assistance transaction that is funding or could fund the same activity as the proposed SEP, the SEP cannot be approved.

- Where the defendant, SEP recipient, or third-party SEP implementer has identified an open federal financial transaction that it believes *arguably* could fund the same activity as the SEP (*i.e.,* there is some uncertainty), but the case team wishes to pursue approval of the project, the case team should bring the SEP proposal and any available information concerning the terms of the transaction to the EPA's National SEP Policy Coordinators in the Office of Civil Enforcement (OCE) in the Office of Enforcement and Compliance Assurance (OECA) for analysis and an augmentation determination. Such a determination will usually include input from augmentation experts in the Office of General Counsel (OGC). If the settlement involves a federal agency, the consultation should be with the Federal Facilities Enforcement Office (FFEO) in OECA. If the settlement involves a CERCLA violation by a non-federal responsible party, the consultation should be with the Office of Site Remediation Enforcement (OSRE).

See Section IV of this Appendix for step-by-step instructions on making these determinations.

III. Definitions:

"Open federal financial assistance transaction" refers to a grant, cooperative agreement, federal loan, or federally guaranteed loan. It is often abbreviated as "FFAT."

"Could fund the same activity" describes a federal financial assistance transaction that is not currently funding the same activity as a proposed SEP, but whose scope of work is written broadly enough to include the same activity as the SEP. When the holder of the federal financial assistance transaction is spending its federal dollars on some other activity, but could have opted, under the terms of the transaction, to spend those federal dollars to fund the same activity as the proposed SEP, then that federal financial assistance transaction "could fund the same activity" as the SEP.

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[3] Although it may seem duplicative to have the defendant make inquiry regarding the existence of open federal financial assistance transactions with the EPA when the Agency has performed that inquiry, the defendant's separate inquiry provides additional assurances to supplement the EPA's internal due diligence.

"Reasonable inquiry to prevent augmentation" means a reasonable, not heroic, inquiry to determine whether a SEP is prohibited due to augmentation. A reasonable inquiry need not exhaust every theoretical possibility that there is an open federal financial assistance transaction that could fund the same activity as a proposed SEP.

"Specific EPA appropriation" is a unique term for the SEP Policy. It does not include lump-sum appropriations such as those for Superfund or Underground Storage Tanks that fund broad programs involving a variety of activities that the EPA carries out both directly and through financial assistance. For purposes of this Checklist, the phrase "specific EPA appropriation" refers only to EPA appropriations that have been identified as such by the EPA's Office of General Counsel (OGC) for the applicable fiscal year. OGC's list of specific EPA appropriations is available on OCE's SEP intranet site and will be updated as necessary.

"The same activity as the SEP" means the SEP as proposed by the defendant, in terms of scope, purpose, and location.

It does not mean "the same *type* of activity" (*e.g.*, the specific equipment to be donated; services to be provided; or project to be implemented). Detailed proposals are easier to evaluate than general ideas or concepts. To evaluate whether a transaction covers the same activity as the SEP, look to the terms of the SEP and scope of work for the transaction. The National SEP Coordinators are available to assist with this analysis.

"SEP recipient" means the direct beneficiary of the SEP activity (*e.g.*, local fire departments receiving equipment donations; or conservation groups taking possession of land donated and conserved as a SEP).

"SEP recipient" does not extend to the community generally. For example, citizens served by a fire department receiving equipment donations are not considered SEP recipients for augmentation purposes.

"Third-party SEP implementer* or *SEP implementer" means a contractor/consultant or another third party engaged by the defendant to implement the SEP.

An implementer may also be a SEP recipient (*e.g.*, a land trust that accepts a land donation and agrees to maintain a conservation easement).

IV. Process and Checklist

The objective of this process is to allow the EPA to make a reasonable, not heroic, inquiry to ensure that SEPs included in settlement of the EPA's enforcement actions do not augment federal appropriations. In most cases, this inquiry should be relatively simple and straightforward for both case teams and defendants.[4] Below is a process checklist containing questions the EPA

[4] EPA's statutory authority to accept diesel emissions reduction SEPs eliminates the need to consider whether EPA receives a specific appropriation and whether federal grant monies are directed to those

case team and/or the defendant should ask to complete these inquiries; bulleted suggestions on how to make the necessary determinations; and instructions on the effect of certain results on the augmentation analysis (*i.e.*, whether the SEP cannot be approved based on a particular determination, or whether the analysis should continue on to the next question).

A. For the EPA Case Team:

1. Does the SEP provide EPA with additional resources to perform a particular activity for which EPA has a specific appropriation?

- Review the EPA Specific Appropriations List on the EPA's SEP Intranet site for an Annual OGC Report on EPA Specific Appropriations to ensure there is no specific appropriation available for the particular activity that is proposed as a SEP.

- Annually, OGC will provide the SEP Coordinators with the appropriations bill and conference committee reports for the fiscal year and identify specific appropriations that pose augmentation concerns to be listed on the SEP Intranet site.

- If IT DOES, STOP. The SEP cannot go forward, unless it is a diesel emissions reduction SEP (*see* Footnote 4).
- If NOT, GO on to Question 2.

2. Does the SEP provide EPA with additional resources to meet a statutory obligation or circumvent a statutory prohibition?

- To the extent appropriate, based on the specific activities that will be involved in performing the SEP, consult EPA and other federal statutes to determine whether there is already a statutory obligation to perform the activity, or if the activity is specifically prohibited by statute.

- If IT DOES, STOP. The SEP cannot go forward.
- If NOT, GO on to Question 3.

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projects. *See* Legal Guideline IV.D in the Update. Case teams evaluating diesel emission reduction SEPs need only make determinations regarding Appendix Questions IV.B.2.a.i., IV.B.2.a.ii., and IV.B.2.b.i. Determinations about Questions IV.B.2.a.iii. and IV.B.2.b.ii. are not required, nor is the federal-funding-focused inquiry by the defendant that is outlined in IV.C.

3. Does the SEP provide additional support for a project performed by EPA or another federal agency?

- Consult, to the extent considered appropriate by the case team, with the Regional media, geographic and/or special program contacts relevant to the type of SEP being proposed, who are likely to know about projects being performed by the EPA or another federal agency that relate or overlap with the location and/or the activities in the SEP proposal.

- The relevant question to ask: "Is there a federal agency already performing a project (through a contract or with federal personnel) with the same specific purpose of the SEP and in the same location (per the scope of work), such that the SEP will have the effect of supplementing the resources available for the federal project?"
    - A project that is overseen by a federal agency to ensure compliance with regulatory standards but that is carried out by a non-federal entity is not a "project performed by the EPA or another federal agency" for purposes of this inquiry. This is true even though a federal agency might have authority to direct or provide guidance to the entity performing the project to the extent allowed by applicable regulations.

- In some cases, a federal agency may have specific statutory gift authority to accept such support. In that event, the SEP is approvable with regard to this part of the inquiry.

- In most cases, the existence of a federal project should be fairly obvious. For example, to vet a proposed SEP for wetlands restoration immediately adjacent to the Florida Everglades, the EPA would contact the Army Corps of Engineers, which is performing such work in the area, to ensure the proposed parcel and project are not part of work already being performed. Where a case team finds this inquiry difficult, it should come to the National SEP Coordinators in OCE (or in FFEO or OSRE, as appropriate) for assistance.

- As part of its reasonable inquiry, the EPA is not required to consult personnel at other federal agencies unless there is some compelling reason to do so. However, the EPA may, at its discretion, choose to consult with other federal agencies if it finds that such consultation may be helpful.

➢ If IT DOES, STOP. The SEP cannot go forward, unless the agency has statutory gift acceptance authority (*see* third bullet above).
➢ If NOT, GO on to Question 4.

4. Does the SEP provide resources to perform work on federally-owned property?

- Make sure that the SEP is not on federally-owned property (or that the agency involved has specific statutory gift acceptance authority which would allow this).

- In most cases, the ownership of the proposed property should be fairly obvious. Where a case team finds this inquiry difficult, it should come to National SEP Coordinators in OCE (or in FFEO or OSRE, as appropriate) for assistance.

➢ If IT DOES, STOP. The SEP cannot go forward, unless the agency has specific statutory gift acceptance authority which would allow this.
➢ If NOT, GO on to Question 5.

5. Is there an open EPA federal financial assistance transaction (FFAT) with the defendant, the SEP recipient, or any third-party SEP implementer that is funding or could fund the same activities as the SEP (*i.e.,* the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location)?

- Consult regional grants officers, relevant regional programs, and/or regional grants databases as appropriate and/or available in the relevant region to inquire about open FFATs involving the defendant, SEP recipient, or any third-party SEP implementer.

- The EPA's Office of Grants and Debarment has developed the EPA Grant Awards Database that case teams can also be used to perform this inquiry. The EPA Grant Awards Database contains a summary record for all non-construction EPA grants awarded in the last 10 years as well as records for grants awarded earlier which are still open. Grant listings are available by recipient and by type, and there is a separate list breaking out all awards to nonprofits, which may be particularly helpful. Visit http://yosemite.epa.gov/oarm/igms_egf.nsf/HomePage?ReadForm to search and review the list of EPA Grant Awards for potentially relevant listings.
    - If a grant award that could potentially fund the same activity as the SEP is identified, consult with the EPA contact listed for that grant award to determine or to verify that the open FFAT could fund the same activity as the SEP.

- The Catalog of Federal Domestic Assistance (CFDA, availabw.cfda.gov) lists all EPA domestic federal financial assistance programs and includes points of contact for each program, and is a third resource for this inquiry. Visit https://www.cfda.gov/?s=agency&mode=form&tab=program&id=1135d1667

2c45b40dc20729acdb1e903 to search and review the list of EPA grant programs for potentially relevant grant programs.

- If a grant program that could fund the same activity as the SEP is identified, consult with the EPA contact listed for that program to determine whether there is an open FFAT that could fund the same activity as the SEP.

- If THERE IS such an OPEN FFAT between EPA and any of these parties, that is funding or could fund the SEP (*i.e.*, FFAT's scope of work lists or includes the same activities as the SEP), STOP. The SEP cannot go forward, unless it is a diesel emissions reduction SEP.

- If the OPEN FFAT ARGUABLY COULD FUND the SEP (*i.e.*, there is some uncertainty), the case team should consult the National SEP Coordinators in OCE (or in FFEO or OSRE, as appropriate) and OGC augmentation experts, who may be familiar with EPA program activities or can help identify program contacts. The names and contact information for the current SEP contacts and experts are available on the SEP intranet site: http://intranet.epa.gov/oeca/oce/slpd/sep.html

- If there is NO such OPEN FFAT, and assuming acceptable results from the defendant's inquiry, and its required certification in the settlement agreement: **the SEP is appropriate from an augmentation standpoint, and may be included in settlement.**

B. For the Defendant:

1. Does the defendant itself have an open FFAT with the EPA, or any other federal agency, that is funding or could fund the same activities as the proposed SEP (*i.e.*, the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location)?

- The defendant must inquire internally whether it has an open FFAT with the EPA or any other federal agency that is funding or could fund the same activities as the proposed SEP (*i.e.*, the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location).

- If the defendant DOES HAVE an OPEN FFAT that IS FUNDING or COULD FUND the same activity, STOP. The proposed SEP cannot be approved because it presents an augmentation.

- If the defendant has an OPEN FFAT that ARGUABLY COULD FUND the same activity (*i.e.*, there is some uncertainty), the case team should bring the SEP proposal and any available information concerning the terms of the transaction to the National SEP

Coordinators in OCE (or in FFEO or OSRE, as appropriate) and OGC augmentation experts for analysis and an augmentation determination.

- If the defendant DOES NOT HAVE such an OPEN FFAT, GO on to Question 2 below.

2. Does the SEP recipient or any third-party SEP implementer have an open FFAT with the EPA, or any other federal agency, that is funding or could fund the same activity as the proposed SEP (*i.e.,* the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location)?

- The defendant should ask the SEP recipient and any third-party SEP implementer if they have an open FFAT with the EPA or any other federal agency that is funding or could fund the same activity as the proposed SEP (*i.e.,* the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location).
- At its own election, the defendant may choose to ask the SEP recipient or implementer for certification of its answers.

- If either the SEP recipient or the third-party SEP implementer indicates that it HAS an OPEN FFAT that IS FUNDING or COULD FUND the same activity, STOP. The proposed SEP cannot be approved because it presents an augmentation.

- If either the SEP recipient or the third-party SEP implementer indicates that it has an OPEN FFAT that ARGUABLY COULD FUND the same activity (*i.e.,* there is some uncertainty), the case team should bring the SEP proposal and any available information concerning the terms of the transaction to the National SEP Coordinators in OCE (or in FFEO or OSRE, as appropriate) and OGC augmentation experts for analysis and an augmentation determination.

- If the SEP recipient and third-party SEP implementer indicate that they DO NOT HAVE such an OPEN FFAT, GO on to Question 3 below.

3. Will the defendant make the required certification in the Consent Agreement or Consent Decree?

Defendant certifies that —

(1) It is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in paragraph X; and

(2) It has inquired of the SEP recipient and/or SEP implementer [use Proper Names where available] whether either is a party to an open federal financial assistance transaction that is funding or could fund the same activity as the SEP and has been

informed by the recipient and/or the implementer [use Proper Names where available] that neither is a party to such a transaction.

- IF SO, and assuming acceptable results from the EPA's inquiry -- **the SEP is appropriate from an augmentation standpoint, and may be included in settlement**

Previously Issued SEP Policy Implementation Guidance

Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Exception to the Minimum Penalty Requirements for Proposed Supplemental Environmental Projects in Administrative Matters Resolving Violations of TSCA Sections 402, 404 and 406(b)* (Dec. 14, 2012)

Memorandum from Susan Shinkman, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Securing Mitigation as Injunctive Relief In Certain Enforcement Settlements* (2d ed., Nov. 14, 2012)

Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Transmittal of the Office of General Counsel's Opinion on Legal Guidelines Under the 1998 Supplemental Environmental Projects Policy Relating to Impermissible Augmentation of Appropriations* (Apr. 18, 2011)

U.S. Envtl. Prot. Agency, Office of General Counsel, *Revising the Augmentation of Appropriations Standard in Legal Guideline 5.b. of EPA's 1998 Policy on Supplemental Environmental Projects* (Mar. 3, 2011)

Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects to Reduce Diesel Emissions* (July 18, 2008)

Memorandum from Granta Y. Nakayama, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Advisory Memorandum on Internal Revenue Service Directive Regarding the Deductibility of Supplemental Environmental Projects* (Dec. 21, 2007)

U.S. Envtl. Prot. Agency, Office of Site Remediation and Enforcement, *Fact Sheet: Brownfield Sites and Supplemental Environmental Projects* (Nov. 2006)

Memorandum from Mark Pollins, Dir., Water Enforcement Div., and Robert Kaplan, Dir., Multimedia Enforcement Division, U.S. Envtl. Prot. Agency, *Clean Water Act Municipal Settlements and Supplemental Environmental Projects (SEPs)* (Nov. 4, 2005)

Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Reminder That Waiver is Required for Supplemental Environmental Projects Not Meeting All Conditions of SEP Policy* (Mar. 21, 2005)

Memorandum from Thomas V. Skinner, Acting Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases* (Nov. 23, 2004)

Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds* (Dec. 15, 2003)

Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects* (Dec. 5, 2003)

Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003)

Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects* (June 12, 2003)

Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Expanding the Use of Supplemental Environmental Projects* (June 11, 2003)

Memorandum from Phyllis P. Harris, Principal Deputy Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Clarification and Expansion of Environmental Compliance Audits Under the Supplemental Environmental Projects Policy* (Jan. 10, 2003)

Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy* (Oct. 31, 2002)

Memorandum from Sylvia K. Lowrance, Acting Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects (SEP) Policy* (Mar. 22, 2002)

Memorandum from Eric V. Schaeffer, Dir., Office of Regulatory Enforcement, U.S. Envtl. Prot. Agency, *Appropriate Penalty Mitigation Credit Under the SEP Policy* (Apr. 14, 2000)

Memorandum from Eric V. Schaeffer, Dir., Office of Regulatory Enforcement, U.S. Envtl. Prot. Agency, *Revised Approval Procedures for Supplemental Environmental Projects* (July 21, 1998)

Memorandum from Steven A. Herman, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Issuance of Final Supplemental Environmental Projects Policy* (Apr. 10, 1998)

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Cozad, David[Cozad.David@epa.gov]
Cc: Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]; Fogarty, Johnpc[Fogarty.Johnpc@epa.gov]
From: Shinkman, Susan[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=738C02CAB58044BEB31A5DBB945056B3-SHINKMAN, SUSAN]
Sent: Tue 1/24/2017 6:34:54 PM (UTC)
Subject: FW: SEP, NSI and ESA policies
ESA Policy_Revised_112414.pdf
SEP Policy_Updated_051015.pdf
NSI_Draft Final_012417.pdf

Attached are the ESA, SEP and NSI policies. The NSI was just updated and this is the most current version.

From: Fogarty, Johnpc
Sent: Tuesday, January 24, 2017 1:13 PM
To: Shinkman, Susan <Shinkman.Susan@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: SEP, NSI and ESA policies

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
From: Miles, Erin[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6626066EC1B9434EA1D768020C4D56C3-MILES, ERIN]
Sent: Fri 3/24/2017 9:42:38 PM (UTC)
Subject: FW: Houston Briefing Paper
City of Houston Briefing Paper (3-24-17).docx

There doesn't seem to be anyone around in the AO at all, so I think we'll have to walk it down first thing Monday morning.

From: Shiffman, Cari
Sent: Friday, March 24, 2017 5:37 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Cozad, David <Cozad.David@epa.gov>
Cc: Shinkman, Susan <Shinkman.Susan@epa.gov>; Miles, Erin <Miles.Erin@epa.gov>
Subject: Houston Briefing Paper

Larry,

Attached is the final Houston Briefing Paper. Please distribute as you see fit.

Thanks,

Cari Shiffman, Special Assistant
U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office: (202) 564-2898 | Mobile: (202) 823-3277

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]; Cozad, David[Cozad.David@epa.gov]
Cc: Shinkman, Susan[Shinkman.Susan@epa.gov]; Hindin, David[Hindin.David@epa.gov]; Makepeace, Caroline[Makepeace.Caroline@epa.gov]; Cavalier, Beth[Cavalier.Beth@epa.gov]; Kelley, Rosemarie[Kelley.Rosemarie@epa.gov]
From: Fogarty, Johnpc[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: Thur 2/2/2017 7:00:28 PM (UTC)
Subject: RE: SEPs
SEP Transition Materials-Data and Summaries.2.2.2017.pdf

As revised.

From: Starfield, Lawrence
Sent: Thursday, February 02, 2017 12:27 PM
To: Cozad, David <Cozad.David@epa.gov>
Cc: Shinkman, Susan <Shinkman.Susan@epa.gov>; Hindin, David <Hindin.David@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>
Subject: RE: SEPs

This is excellent – I can't believe how many articles and how much great data you collected so quickly. Terrific work.

Two questions:

Ex. 5 AC/DP

Please try to address these two minor points, and then send to Justin.

Thanks.

Larry

From: Cozad, David
Sent: Thursday, February 02, 2017 11:20 AM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Shinkman, Susan <Shinkman.Susan@epa.gov>; Hindin, David <Hindin.David@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>
Subject: SEPs

Hi Larry,

Attached is the package of material we propose to provide to Justin on SEPS. It consists of:

1. Overview/SEP basics
2. One page summary of the overall stats/numbers
3. Third party papers, reviews, and analysis on SEPs
4. Copy of the new proposed "slush fund" legislation
5. One pager summarizing the admin SEP spreadsheet and explaining a few anomalies in the data
6. Spreadsheet with info on all admin case SEPS for last three years (not attached here; let me know if you want that).

Let us know if you have questions or would like changes. If you want a briefing, we can set that up quickly as well.

Thanks to David's data team for pulling the info, and to John, Beth, and Caroline for the programmatic info and analysis.

Dave

Supplemental Environmental Projects Policy Fact Sheet

What a SEP is:

- A SEP is an environmentally beneficial project that is proposed by a defendant to be included as additional injunctive relief in an enforcement settlement.

- A SEP is voluntary – it cannot be required or compelled by EPA.

- A SEP is developed and implemented by a settling defendant using its own funds.

- A SEP is included in a settlement only if a defendant is interested in the project and it meets the legal and other criteria contained in EPA's SEP Policy.

What a SEP is not:

- A SEP is not a payment of money to a third party in lieu of penalties.

- A SEP cannot augment or supplement EPA's or another government agency's budget or program.

- A SEP cannot be directed, controlled, or managed by EPA.

- A SEP cannot be undertaken using federal loans, federal contracts, federal grants, or any other form of federal financial assistance or other federally-provided assistance.

Fundamentals of SEPs:

- In any negotiated enforcement settlement, initial penalty calculations may be adjusted for a variety of reasons, such as self-disclosure, cooperation, and a good faith effort to comply. At this point in negotiations, a defendant may propose a SEP to mitigate the initial penalty.

- Because performance of a SEP provides additional public health or environmental benefits as part of the settlement, the initial penalty may be adjusted downwards in recognition of the health or environmental benefits of the project, and the defendant's willingness to perform the additional work as part of the settlement.

- To ensure that EPA is appropriately exercising its enforcement discretion, to be included in a settlement a defendant's proposed project must meet a variety of legal requirements, including that there is a nexus, or connection, to the violation being resolved and the goals of the underlying statute, and compliance with federal "anti-augmentation" laws (Miscellaneous Receipts Act and the Anti-Deficiency Act), as well as opinions of the Comptroller General and applicable caselaw.

- Settlements with SEPs always include a final settlement penalty amount that retains its deterrent value – specifically, an amount that reflects the gravity or seriousness of the violation, and that recoups the unfair economic advantage that the defendant obtained over its law-abiding competitors in order to maintain a level playing field for those who remained in compliance.

SEP Statistics at a Glance

Over the three-year period from FY2014 through FY2016, a total of 31 civil judicial settlements included Supplemental Environmental Projects ("SEPs"), with a total dollar value of $45.42 million. Over this same period of time, 301 administrative settlements included SEPs, with a total dollar value of $42.35 million. Only a fraction of all settlements include SEPs, averaging 7.4% over the last three-year period.

The most common type of projects performed by settling defendants are to provide emergency response equipment to local fire departments and first responders, in settlement of EPCRA and RCRA cases involving hazardous wastes. Providing blood lead level testing for children or performing lead abatement projects in housing are often seen as SEPs in lead renovation and repair cases under TSCA. Other commonly-seen projects include those where companies modify production or other facility processes to reduce the amount of potentially toxic chemicals used or the amount of pollutants discharged (which can save the company pollution control and waste disposal costs). Recent CWA cases with municipalities to improve their wastewater infrastructure have included SEPs for the repair or replacement of lateral sewer lines serving residential communities.

The detailed per-year breakdown for all SEPs from FY2014 through FY2016 is shown in the charts and graphs below.

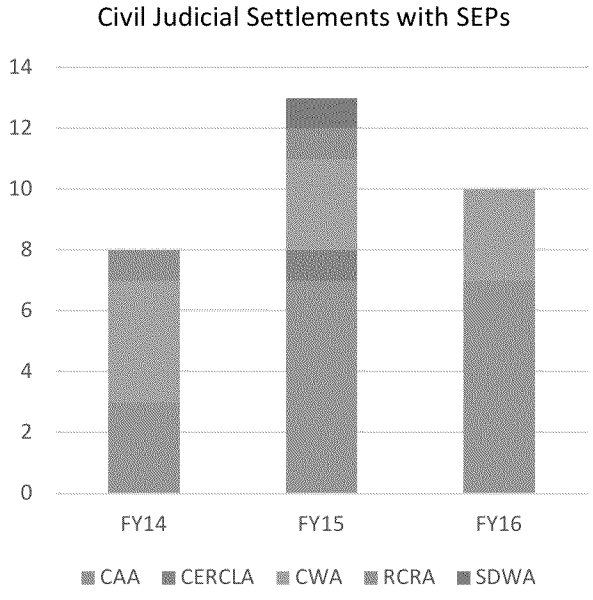
Breakdown of Judicial and Administrative Cases with SEPs:

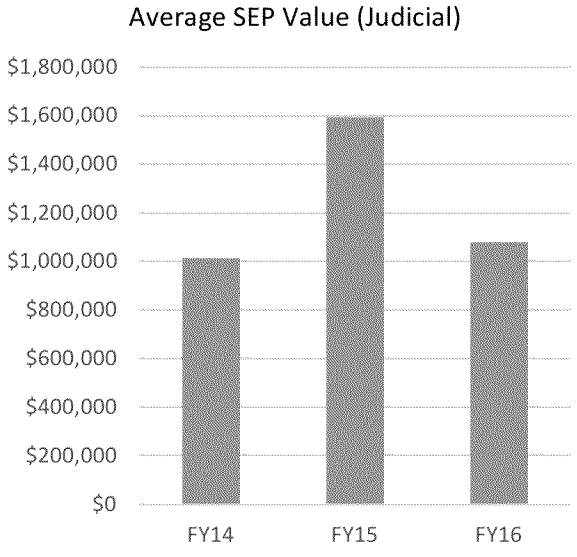
	Number of Judicial Cases w/SEPs	Average SEP Value (Judicial)	Number of Admin Cases w/SEPs	Avg SEP Value (Admin)	Percentage of all Cases w/SEPs
FY14	8	$1.014M	94	$85,770	6.9%
FY15	13	$1.593M	110	$113,417	8.1%
FY16	10	$1.078M	97	$198,620	7.2%
3-year Avg	**10.3**	**$1.297M**	**100.3**	**$133,204**	**7.4%**

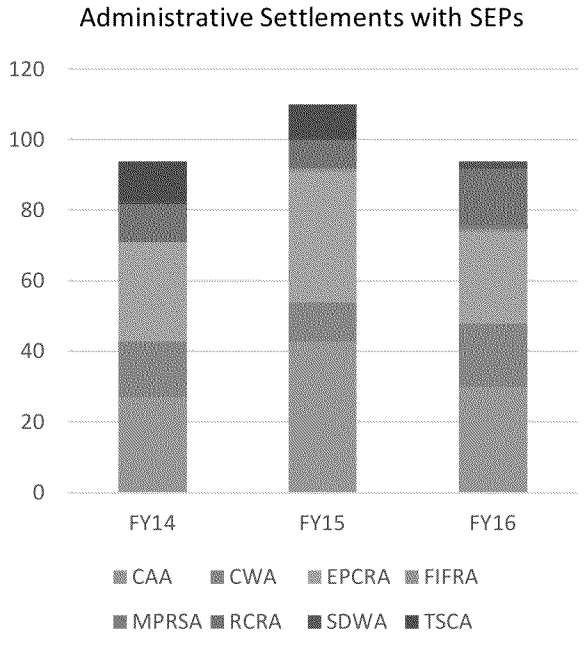
Breakdown of Number of SEPs by Statute (all cases):

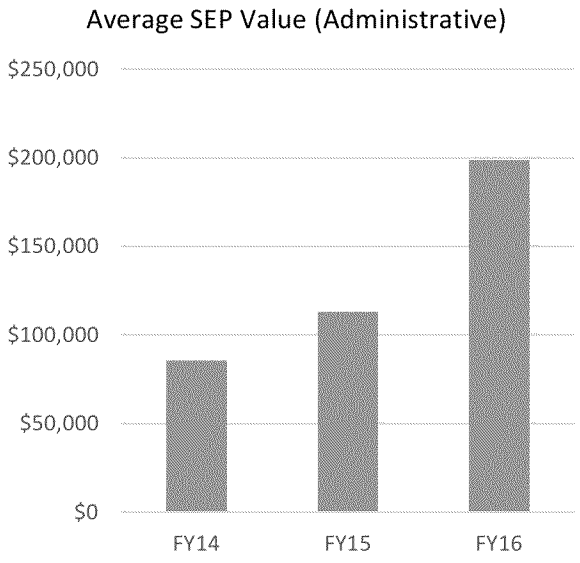
	CAA (non-112(r))	CAA 112(r)	CERCLA	CWA	EPCRA	FIFRA	MPRSA	RCRA	SDWA	TSCA	**TOTAL**
FY14	12	18	0	20	28	0	0	12	0	12	**102**
FY15	23	27	1	14	37	1	0	9	1	10	**123**
FY16	20	17	0	21	26	1	1	16	2	3	**107**
TOTAL	**55**	**62**	**1**	**55**	**91**	**2**	**1**	**37**	**3**	**25**	**332**

SEP Statistics at a Glance









Ex. 5 Attorney Work Product (AWP)/AC/DP

Ex. 5 Attorney Work Product (AWP)/AC/DP

Third-Party Reviews of the SEP Policy

This follows up on the question during the 1/26 discussion on SEPs for whether there are any third-party reviews or evaluations of the SEP Policy. There are a few assessments that are either narrowly-focused or broadly general, as follows:

- At the request of then-Representative John Dingell, the Comptroller General reviewed a non-SEP Policy settlement practice under Title II of the Clean Air Act, of accepting "alternate payments" to outside parties in lieu of penalties. Citing earlier opinions involving other agencies, the Comptroller General concluded that "EPA's power to 'compromise, or remit, with or without conditions' administrative penalties assessed under section 205 of the Clean Air Act as amended does not authorize EPA's alternative payment policy." Opinion of the Comptroller General B-247155 (July 7, 1992). The text of the GAO's decision is attached.

- In followup to the Comptroller General's 1992 opinion, Representative Dingell requested the Comptroller General to review whether such alternative payments to outside parties was permissible under EPA's 1991 SEP Policy (since superseded). The Comptroller General, citing its earlier opinion, confirmed that such payments were not permissible and would violate the Miscellaneous Receipts Act. Opinion of the Comptroller General B-247155.2 (March 1, 1993) (copy attached). Both opinions also discussed the importance of "nexus" or the relationship between a supplemental project agreed to in a settlement and the underlying violations and applicable statute when determining the extent of the Agency's prosecutorial discretion.

    - In neither opinion was the Comptroller General questioning the type of projects that are permitted by the SEP Policy, but was focused principally on the payment of monies to third parties, which is not allowed under the Policy: specifically, the SEP Policy flatly and expressly prohibits projects in which money is paid to a third party (SEP Policy, § VI, "Projects Not Acceptable as SEPs"). The SEP Policy also includes an extensive discussion of additional legal requirements applicable to SEPs, including those for nexus, to ensure there is no impermissible augmentation of Congressional appropriations, and other legal requirements for a proposed project. (SEP Policy, § IV, "Legal Guidelines"). In addition, the Policy was developed with both the US Department of Justice as well as the Office of General Counsel, to ensure that all legal requirements applicable to SEPs are covered in the SEP Policy.

- Also attached are client newsletters from Barnes & Thornburg and Goodwin Procter on the updated 2015 SEP Policy. Both summarize the legal and other requirements for SEPs, and additionally both note the "win-win" advantages of SEPs for their clients in settlement of an enforcement action. While not a strict legal analysis of SEPs, they are illustrative of the defense bar's perspective.

Text of Comptroller General Opinion B-247155 (July 7, 1992), available at http://www.gao.gov/products/402023

MISCELLANEOUS TOPICS Environment/Energy Natural Resources Air pollution Administrative settlement Authority The Environmental Protection Agency lacks authority to settle mobile source air pollution enforcement actions brought pursuant to section 205 of the Clean Air Act, as amended, 42 U.S.C.A. Sec. 7524 (West Supp. 1991), by entering into settlement agreements that allow alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them.

The Honorable John D. Dingell Chairman, Subcommittee on Oversight and Investigations Committee on Energy and Commerce House of Representatives

Dear Mr. Chairman:

Your letter of December 13, 1991, requested that we examine whether the Environmental Protection Agency (EPA) has legal authority to settle mobile source air pollution enforcement actions brought pursuant to section 205 of the Clean Air Act (the Act), as amended, 42 U.S.C.A. Sec. 7524 (West Supp. 1991), by entering into certain settlement agreements. These settlement agreements allow alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them. As explained below, we conclude that EPA does not have authority to settle these enforcement actions in such a manner.

Background

Prior to its amendment in 1990, section 211 of the Clean Air Act provided for the payment of specified civil penalties by persons who violated certain provisions of the Act regulating fuels. 42 U.S.C. Sec. 7545(d) (1988). Former section 211 further provided for the recovery of these civil penalties through judicial proceedings brought in the appropriate United States district court. Id. Under former section 211, the EPA Administrator was also authorized to "remit or mitigate" these penalties. Id.

According to documents supplied to us by EPA, the EPA developed a policy pursuant to the former section 211 whereby it would issue "Notices of Violations" to alleged violators of the fuels provisions and attempt to enter into settlements with these alleged violators in lieu of instituting judicial proceedings. Such settlements could include reductions in the penalties specified in the statute. Factors taken into account by the EPA in determining whether to reduce penalties included action taken by the alleged violator to remedy the violation.

In addition, the EPA in 1980 developed an "alternative payment" policy with respect to the fuels provisions of the Act, whereby alleged violators could receive reductions in their cash penalties if they agreed to pay for certain public information or other projects approved by the EPA relating to mobile source air pollution issues.[1] At the same time, EPA extended this alternative payment policy to penalties

[1] Examples of projects paid for by alleged violators have included an American Automobile Association training program to instruct high-school automotive instructors on the most recent emissions control technology and sponsorship by the alleged violator of public events to promote clean air, including marathons, bicycle races, fairs, airplane towing messages, and "Clean Air Days." See Attachment to Nov. 8, 1991 Letter from EPA Administrator William K. Reilly to Honorable John D. Dingell.

for violations of former section 203 of the Clean Air Act, 42 U.S.C. Sec. 7522 (1988), which, inter alia, prohibited tampering with emissions control devices. The section governing penalties for tampering violations-- former section 205 of the Act, 42 U.S.C. Sec. 7524 (1988)--did not explicitly authorize EPA to remit or mitigate penalties for tampering violations, but EPA justified its extension of the alternative payment policy to penalties for these violations on the ground that former section 205 did provide for EPA discretion in determining the penalty amount.

The Clean Air Act Amendments of 1990 (1990 Amendments), Pub. L. No. 101-549, 104 Stat. 2399, amended section 205 to establish new maximum penalties for a number of the mobile source violations of the Act. Section 228(c), 104 Stat. at 2508. The 1990 Amendments further established authority for the administrative assessment of certain civil penalties (including the penalties for fuels and tampering violations) by an order made on the record after an opportunity for a hearing. Id. The Amendments set forth various factors for EPA to consider in assessing these civil penalties. Id. In addition, the 1990 Amendments gave EPA power to "compromise, or remit, with or without conditions" any administrative penalty that could be imposed under section 205. Id.

Discussion

EPA asserts that its power to "compromise, or remit, with or without conditions," civil penalties assessed under amended section 205 of the Clean Air Act provides a sufficient legal basis for its practice of funding public awareness projects with civil penalties assessed. See Attachment to Nov. 8, 1991 Letter from EPA Administrator William K. Reilly to Honorable John D. Dingell (EPA Letter). EPA also attempts to justify its alternative payment policy on the ground that the funded projects further the goals expressed by Congress in sections 101 through 104 of the Clean Air Act. In particular, EPA points to section 103(a)(5), which requires EPA to "conduct and promote coordination and acceleration of training relating to the causes, effects, extent, prevention, and control of air pollution," and former section 103(f)(1)(B), which required the Administrator to seek "to improve knowledge of the short- and long-term effects of air pollutants on welfare." Id. We disagree with both of these arguments.

In two earlier decisions, we held that the Nuclear Regulatory Commission (NRC) and the Commodity Futures Trading Commission (CFTC) lacked authority to adopt enforcement schemes similar to EPA's alternative payment policy. 70 Comp.Gen. 17 (1990); B-210210, Sept. 14, 1983. Our 1990 NRC decision involved statutory language virtually identical to that in the provision EPA contends authorizes its alternative settlement policy. Section 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. Sec. 2282, gave the NRC power to impose civil monetary penalties, not to exceed $100,000, and to "compromise, mitigate, or remit" such penalties. The NRC had requested our opinion whether this provision authorized it to permit a licensee who violated NRC requirements to fund nuclear safety research projects at universities or other nonprofit institutions in lieu of paying a penalty or a portion of a penalty. Like the EPA in this case, the NRC had pointed out that its enforcement proposal would further another statutory objective--in the NRC's case, its authority to award contracts to nonprofit educational institutions to conduct nuclear safety-related research.

We determined that the NRC's discretionary authority to "compromise, mitigate, or remit" civil penalties empowered it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but that its authority did not extend to remedies unrelated to the correction of the violation in question. 70 Comp.Gen. at 19. Under the NRC proposal, we noted, a violator would contribute funds to an institution that, in all likelihood, would have no relationship to the violation and would not have suffered any injury from the violation. Id.

Moreover, from an appropriations law perspective, such an interpretation would have required us to infer that Congress had intended to allow the NRC to circumvent 31 U.S.C. Sec. 3302(b) and the general rule against augmentation of appropriations. Id. Section 3302(b) requires agencies to deposit money received from any source into the Treasury; its purpose is to ensure that Congress retains control of the public purse. Id. In our view, the enforcement scheme proposed by the NRC would have resulted in an augmentation of NRC's appropriations, allowing it to increase the amount of funds available for its nuclear safety research program. Id.

Neither the language nor the legislative history of section 234 of the Atomic Energy Act of 1954 provided any basis for an inference that Congress had intended to allow the NRC to circumvent these appropriations principles. Accordingly, we concluded that section 234 did not authorize the NRC to reduce civil penalties in exchange for a violator's agreement to fund nuclear safety research projects. Id. at 19-20.

Similarly, our 1983 CFTC decision involved the CFTC's proposal to accept a charged party's promise to make a donation to an educational institution as all or part of the settlement of a case brought under the prosecutorial power provided the CFTC by the Commodity Exchange Act, as amended, 7 U.S.C. Secs. 9, 13b (1976). B-210210, Sept. 14, 1983. Like the NRC, and the EPA in this case, the CFTC had argued that such settlement terms would aid in the accomplishment of another of the Commission's statutory functions--in the CFTC's case, the establishment and maintenance of research and information programs which assisted in the development of educational and other informational materials regarding futures trading. Id. We held, as we later did in the NRC case, that the CFTC was without authority to achieve its educational and assistance function through the use of settlement agreements exacted from the exercise of its prosecutorial power. Id. We see no basis for concluding that EPA's prosecutorial authority under section 205 of the Clean Air Act is any more expansive than that of the NRC or the CFTC.

Finally, EPA argues that Congress ratified its alternative payment policy when it amended section 205 of the Clean Air Act in 1990. See EPA Letter. We disagree. In support of its ratification argument, EPA quotes a single sentence in a report on the Senate's version of the Clean Air Act Amendments of 1990. Id. The sentence is: "The Administrator may continue to issue . . . [Notices of Violation] to alleged violators of Title II provisions and to settle such matters to the extent authorized by law . . ." (quoting S. Rep. No. 228, 101st Cong., 1st Sess. 125-26 (1989)).

The context of the sentence was a discussion of the new provision eventually added to section 205 of the Clean Air Act establishing authority for the assessment of civil penalties by administrative proceeding. The Senate report quoted by the EPA was simply making clear that the new provision allowing for the assessment of civil penalties by administrative proceeding "is not intended to preclude the Administrator from utilizing the informal notice of violation (NOV) enforcement process developed for fuels and certain other mobile source violations." See S. Rep. No. 101, 101st Cong. 1st Sess. 125 (1989).

The language quoted by the EPA indicates only that the Senate was aware that EPA had been utilizing this informal process of issuing notices of violation and settling the enforcement actions so instituted. The language does not give any indication that the Senate or the Congress as a whole was aware of the terms by which EPA was settling these enforcement actions. Accordingly, the language in the Senate report cited by EPA does not persuade us that Congress even knew about the EPA's alternative payment policy, much less ratified it. See, e.g., Inner City Broadcasting Corp. v. Sanders, 733 F.2d 154, 160

(D.C.Cir. 1984) (before court would find ratification, at threshold it must be shown that the Congress was "obviously aware" of the policy in question and consciously acted or did not act in response to that policy); Arizona Power Pooling Assoc. v. Morton, 527 F.2d 721, 726 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976)(congressional "[k]nowledge of the precise course of action alleged to have been acquiesced in is an essential prerequisite to a finding of ratification"). The EPA does not cite any purported evidence of congressional knowledge or acquiescence in the terms of its alternative settlements, and we are aware of none.[2]

Accordingly, we conclude that EPA's power to "compromise, or remit, with or without conditions" administrative penalties assessed under section 205 of the Clean Air Act as amended does not authorize EPA's alternative payment policy.

We hope our comments are helpful to you. In accordance with our usual procedures, we will make this opinion available to the public 30 days from its date.

[2] Indeed, Congress's addition in 1990 of a new subsection to the section of the Clean Air Act governing citizen suits demonstrates that had Congress intended to authorize the EPA to fund special projects with civil penalties assessed pursuant to section 205, it could have said so in much clearer terms. See Sec. 304(g)(1), 42 U.S.C.A. Sec. 7604(g)(1) (West Supp. 1991). The new subsection provides that penalties assessed in citizen suits shall be deposited in a special fund in the United States Treasury for use by the EPA Administrator to finance "air compliance and enforcement activities." The new subsection further requires the Administrator annually to report to Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof. Id. The specific language authorizing the funding of EPA air compliance and enforcement activities through penalties received by way of citizen suits stands in stark contrast to the language drafted by the same Congress in section 205, which merely states that EPA may "compromise, or remit, with or without conditions" administrative penalties imposed.

Keegan

Comptroller General
of the United States

Washington, D.C. 20548

DO NOT MAKE AVAILABLE TO PUBLIC READING
FOR 30 DAYS

B-247155.2

March 1, 1993

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

This responds to your February 1, 1993, request that we review the December 28, 1992, response of the Environmental Protection Agency (EPA) to a July 7, 1992, General Accounting Office opinion, B-247155. In that opinion, we concluded that EPA's power to "compromise, or remit, with or without conditions," administrative penalties assessed under section 205 of the Clean Air Act, as amended, does not authorize EPA to enter into settlement agreements allowing alleged violators to fund certain public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them.

EPA's December 28, 1992, letter states that EPA continues to believe that it has the legal authority to include these defendant-funded projects in settlement of enforcement actions. In this connection, EPA questions whether we considered its February 12, 1991, Policy on the Use of Supplemental Environmental Projects in EPA Settlements (the SEP policy) in developing our opinion.

We did consider EPA's SEP policy in developing our opinion in B-247155, and we continue to believe that certain projects allowed under that policy are not authorized by section 205 of the Clean Air Act, as amended. Based on two earlier GAO opinions, we held in B-247155 that EPA's discretionary authority to "compromise, or remit, with or without conditions," civil penalties assessed under section 205 empowers it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but does not extend to remedies unrelated to the correction of the violation in question. See 70 Comp. Gen. 17 (1990); B-210210, Sept. 14, 1983.

EPA's SEP policy, which discusses the types of supplemental projects which will be considered acceptable for use in enforcement settlements, does require what it calls a

556593 148991

"nexus" or relationship between the violation and the environmental benefits to be derived from several types of supplemental projects it permits. SEP policy at 5. For example, under the policy, the appropriate nexus would exist between an environmental restoration project which calls for the acquisition and preservation of wetlands in the immediate vicinity of wetlands injured by unlawful discharges, in order to replace the environmental services lost by reason of such injury.

However, the SEP policy also allows what it calls "public awareness" projects, and for these projects, no nexus at all is required. SEP policy at 4, 5. Therefore, these projects, which constitute the majority of supplemental projects approved by EPA in settlement of mobile source penalties under section 205,[1] can and do go beyond correcting the violation at issue. For example, a permissible project under the policy would be a media campaign funded by the alleged violator to discourage tampering with automobile pollution control equipment. SEP policy at 4. As under the proposal we held unauthorized in our earlier case, involving the Nuclear Regulatory Commission, here, the alleged violator would make a payment to an organization--the media selected to run the campaign--that, in all likelihood, would have no relationship to the violation and would not have suffered any injury from the violation. See 70 Comp. Gen. at 19. It is our view that the EPA's authority to compromise or remit civil penalties does not extend to imposing such remedies through settlement.

EPA also asserts that settlements involving these supplemental projects do not violate the Miscellaneous Receipts Act, 31 U.S.C. § 3302, since the cash portion of the penalty assessed goes to the Treasury. This argument misses the point. As we noted in an earlier opinion, allowing alleged violators to make payments to an institution other than the federal government for purposes of engaging in supplemental projects, in lieu of penalties paid to the Treasury, circumvents 31 U.S.C. § 3302, which requires monies received for the government by government officers to be deposited into the Treasury. B-210210, Sept. 14, 1983. In addition, as we pointed out in our other earlier opinion on this topic, concerning the Nuclear Regulatory Commission, an interpretation of an agency's prosecutorial authority to allow an enforcement scheme

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[1]See March 17, 1992, EPA Memorandum from Mary T. Smith, Director, Field Operations Support Division, to Scott C. Fulton, Deputy Assistant Administrator, Office of Enforcement, re: Office of Air and Radiation, FOSD Program Specific Alternative Payment Policy, at 2, 4.

involving supplemental projects that go beyond remedying the violation in order to carry out other statutory goals of the agency, would permit the agency to improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process. 70 Comp. Gen. at 19.

We hope our comments are helpful to you. In accordance with our usual procedures, we will make this opinion available to the public 30 days from its date.

Sincerely yours,

James F. Hinchman

for Comptroller General
of the United States

ENVIRONMENTAL LAW

April 2015

Same Tune, New Steps: Dancing Through U.S. EPA's Update to its Policy on Supplemental Environmental Projects

Settling federal environmental enforcement actions is one of the most important environmental legal challenges faced by regulated entities, be they multi-national corporations, small family businesses, public institutions, individuals, or municipalities. Regulated entities seeking amicable and optimal settlements with the U.S. Environmental Protection Agency (EPA) and Department of Justice (DOJ) must navigate complex substantive and procedural issues, negotiate stipulated penalties, monetary penalties, response costs and damages, and injunctive relief, and always account for financial assurance, insurance, monitoring, potential third-party claims, and other requirements that structure the parties' post-settlement relationship. In short, the dance steps are multifarious and multifaceted - and your dance partner may not always appear to be the most coordinated or cooperative.

HIGHLIGHTS

EPA issues single repository for all Agency guidance and policies related to the use of SEPs in settlements of administrative and judicial enforcement actions.

Though it does not mark a substantial shift, the SEP Policy Update does helpfully consolidate all existing EPA guidance on the use of SEPs and provides pragmatic guidance on several detailed policy points.

The SEP Policy Update promises to be easier to implement during settlement negotiations – for both regulated entities and the federal government.

That said, one particular corner of federal environmental enforcement policy provides an opportunity to generate 'win-win' components of a settlement and create real environmental value for affected communities - Supplemental Environmental Projects (SEPs).

As explained by the EPA, a SEP "is an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action." As part of resolving either administrative or judicial enforcement actions, a defendant may perform a SEP to offset a portion of the monetary penalty imposed, and, in doing so, can redirect penalty funds from general federal coffers to confer real environmental benefit to the affected community and improve relations with regulators and the public.

SEPs have long been available in federal environmental enforcement settlements, however, EPA guidance and policies applicable to SEPs have historically been scattered throughout a number of interrelated (and not always seamlessly interlocking) documents issued by various offices over the past two decades. The underlying policies have been characterized by various connected and complicated analyses, distinct lines of DOJ and EPA approvals (both at the Region and Headquarters and from various program offices), different sets of required and precluded project characteristics, and tangential legal restrictions derived from both environmental and fiscal federal laws and regulations. With an already complicated policy further obfuscated by its embodiment in scattered Agency sources, SEPs are likely under-utilized.

This dispersion and diversion of Agency instruction on SEPs has, thankfully, come to an end.

On March 10, EPA's Office of Enforcement and Compliance Assurance (OECA) issued a memorandum entitled "2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy," (the "SEP Policy Update"). Lest there be any confusion, the SEP Policy Update does not fundamentally change the approval analyses or substantive requirements for acceptable SEPs. Nor does it change in any dramatic way the underlying dynamics that will render a SEP workable and desirable in a given settlement context.

The SEP Policy Update is framed as "[c]onsolidating the wealth of existing SEP guidance," and in that capacity alone it is of great value. The consolidation and organization of SEP policy and guidance documents is especially helpful on this issue because the possible use of SEPs in any given settlement is frequently only raised during more advanced stages of negotiation, and often in relation to specific monetary penalty proposals that EPA and DOJ choose to provide once other terms are negotiated. As such, delays or debates over how Agency policy should apply to potential SEP proposals can derail agreements or cause parties to abandon potentially fruitful, if administratively complicated, SEPs.

The SEP Policy Update goes further than simply collating existing documents; rather, it improves and explains Agency policy on SEPs in several important respects:

- For the first time, the SEP Policy Update specifically instructs EPA case teams to suggest SEP ideas to defendants and encourages more proactivity among EPA and DOJ attorneys in channeling community input on possible SEPs.
- The SEP Policy Update expressly identifies USEPA priority areas that should be targeted for favorable SEP treatment by the Agency, including children's health, Environmental Justice, pollution prevention, innovative technology, and climate change.
- There are robust and detailed (if somewhat overlapping) provisions related to SEP "implementers" and "recipients" – third parties that may, under certain circumstances, be involved in carrying out the SEP. As before, the settling party must always remain ultimately liable for SEP performance since the SEP will reduce the monetary payment that must be paid.
- More detailed respondent certifications relating to information provided about the SEP to evaluate its appropriateness and worth under the SEP Policy are explained and required in settlement documentation.
- The SEP Policy Update offers a nuanced menu of SEP stipulated penalty provisions and model settlement provisions that may be used to require a SEP in lieu of a monetary stipulated penalty as to compliance with other settlement agreement provisions in limited circumstances.
- The SEP Policy Update walks through issues arising from SEPs performed in multi-defendant cases and the implementation of interlocking SEPs required under separate settlements with distinct defendants.
- The SEP Policy Update retains and explains specific SEP policies applicable to particular types of cases, such as Clean Water Act settlements with municipal entities.

The SEP Policy Update is an important, if under-appreciated, achievement by EPA. Simply consolidating and tightening the diffuse and cumbersome universe of all relevant Agency policies related to SEPs is a boon to both regulator and regulated - it provides an authoritative source to guide SEP negotiations and hopefully expedite and encourage the use of this beneficial and dynamic enforcement settlement tool. Better still, the SEP Policy Update clarifies and hones the Agency's policies in several important ways that should render SEPs more targeted, impactful, accessible, and useful than ever before.

For more information, contact the Barnes & Thornburg attorney with whom you normally work, or one of the following attorneys: Robert Weinstock of the Chicago office at rweinstock@btlaw.com or 312-214-4854; Bruce White of the Chicago office at 312-214-4584 or bruce.white@btlaw.com; Charles Denton of the Michigan office at charles.denton@btlaw.com or 616-742-3974; Sean Griggs of the Indianapolis office at 317-231-7793 or sean.griggs@btlaw.com; or Jeffrey Longsworth of the Washington, D.C., office at 202-408-6918 or jeffrey.longsworth@btlaw.com.

You can also visit us online at www.btlaw.com/environmental.

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Environmental Law Advisory

A monthly update on law, policy and strategy

Supplemental Environmental Projects – Creative Options For Directing Settlement Proceeds

For more than a decade, EPA has encouraged businesses and other entities charged with environmental violations to fund projects in lieu of payment of a portion of civil penalties that otherwise would be assessed in settlements of enforcement actions. Initially, these Supplemental Environmental Projects ("SEPs") were applied predominantly in reporting violation cases, particularly to redress violations charged under the Emergency Planning and Community Right-to-Know Act. EPA has since adopted SEPs as an option in all program areas.

EPA promotes SEPs as a versatile tool for achieving significant environmental benefits, ideally of a kind desired and appreciated by the local community. In fiscal year 2001, EPA approved SEPs valued at over $89 million and collected more than $125 million in civil penalties. In other enforcement and compliance reports, EPA states that the value of the SEPs it has approved, as measured by the economic model it has mandated for that purpose, substantially exceeded the value of the civil penalties that they were used to offset.

For example, in April 2002, EPA announced a settlement under the Clean Air Act that included two SEPs, which it valued at $2.64 million, together with a monetary penalty of $775,000. The SEPs consisted of installing pollution control devices on Boston school buses and renovating a waterfront park. In January 2002, EPA announced a settlement in Indiana under the Clean Water Act that included a $550,00 fine and a $2 million SEP to reduce an industrial facility's use and discharge of process water.

Witnessing these settlements, in which dollars have been invested in public projects widely reported in news media, state and local agencies have followed suit. Most state environmental agencies and many local sewer, air and other authorities encourage SEPs as part of enforcement settlements. Although they look to EPA policies and settlements for guidance, these officials have their own enforcement priorities and budget constraints, and they may apply different standards in approving SEP projects and determining their mitigation value.

SEPs can provide regulated entities with attractive alternatives for reducing monetary penalties to settle environmental enforcement actions. At a minimum, SEPs offer options to invest in projects of the respondents' choosing, rather than funding further government spending. In the right circumstances, other benefits may include improved public relations, energy efficiency gains, reduced material or waste disposal costs, better compliance programs, and increases in productivity.

SEPs, however, are not right for everyone. EPA requires that the economic costs and benefits of a proposed SEP be measured using its economic model, PROJECT. One purpose of PROJECT is to ensure that certain benefits to the respondent, such as tax advantages, are deducted from the total mitigation credit the respondent receives. Respondents also need to weigh costs not fully reflected in the PROJECT model, including the risks and expenses inherent in designing and implementing the SEP, and replacement costs outside the SEP implementation period.

This Advisory provides a brief introduction to EPA's SEP policy, together with an illustrative comparison to state SEP programs across the country. It frames key issues to be considered at the outset of any negotiation where SEPs may be an option, including:

- how and when to use SEPs;
- what types of projects can be SEPs;
- how to calculate the penalty offset;
- criteria employed to evaluate SEPs; and
- how to maximize the monetary penalty reduction.

EPA SEP Project Policy

EPA's SEP Project Policy ("the Policy") defines SEPs and the limits on their use, describes acceptable categories of projects, prescribes the method for quantifying the amount of penalty mitigation allowed, and establishes penalties for noncompliance with an SEP implementation agreement.

Definition of SEPs

SEPs are projects voluntarily undertaken as part of settlements by respondents charged with environmental violations. In exchange for SEP performance, the respondent receives a reduction in the negotiated penalty amount. Investments in SEPs can be used only to offset a fraction of the overall penalty.

To meet EPA's definition of an SEP, a proposed project must be:

- environmentally beneficial;
- implemented entirely after the onset of the enforcement action; and
- not already mandated by law, unless the purpose of the SEP is to accelerate compliance with requirements not effective until at least two years after the date of the project.

EPA maintains national and regional "idea banks" which list projects that respondents may choose as SEPs. Although EPA does not provide any guarantee that a listed project will be approved, the idea banks may provide a cost-effective shortcut to an acceptable SEP that meets EPA's legal definition and requirements.

Legal Guidelines. A key requirement for any SEP is that it have a "nexus" to the violations alleged. Projects are also subject to the following restrictions:

- EPA cannot control or manage the SEP or its funds;
- the SEP must be memorialized in a detailed agreement that EPA can monitor and enforce;
- SEPs cannot be instituted to carry out responsibilities delegated or funded by Congress;
- responsibility and liability for instituting SEPs must be retained by the regulated entity; and
- information concerning the conduct and results of the SEP must be made available to the public.

Categories of SEPs. A proposed project must satisfy the requirements of at least one of the seven categories defined in the Policy. Examples of SEPs from each category are listed at *http://www.epa.gov/Compliance/planning/data/multimedia/seps/searchsep.html.* The benefits to respondents vary depending on the categorical type of project used.

CATEGORY	DESCRIPTION and *EXAMPLE(s)*
Public Health	Provide diagnostic, preventative or remedial health care - *Community medical treatment, therapy or studies*
Pollution Prevention	Reduce the amount or toxicity of pollution produced - *Modifications in technology or processes to eliminate or change materials or wastestreams*
Pollution Reduction	Reduce the amount or toxicity of pollutants released - *Improvements in recycling, treatment and disposal techniques*
Environmental Restoration and Protection	Improve the land, air or water at natural or man-made environments affected by the violation - *Conservation or remediation of resources not otherwise mandated by law*

Assessments and Audits	Examine internal operations to determine if other pollution problems exist or if operations could be improved to avoid future violations *- Pollution prevention or environmental quality assessments* *- Environmental compliance audits with a requirement to correct any discovered violations (typically approved only for small business or community)*
Environmental Compliance Promotion	Help other companies achieve compliance and reduce pollution *- Seminars, publications, training or technical support*
Emergency Planning and Preparedness	Assist state or local emergency response or planning agencies to fulfill their duties under the Emergency Planning and Community Right to Know Act *- Non-cash assistance such as training or equipment*

In considering which category of SEP to pursue, proponents should evaluate which may best fit their individual objectives and provide benefits beyond those accounted for by EPA. For example, the possibility of avoiding future violations, minimizing the impact of violations, satisfying stricter standards and saving money by increasing efficiency are all potential benefits that a proponent may obtain from undertaking projects in the pollution prevention, pollution reduction, and assessments and audits categories. Activities in the public health, environmental restoration, and emergency preparedness categories, by contrast, may provide the proponent with opportunities to strengthen community relations.

Penalty Mitigation

EPA permits a proponent to offset the estimated cost of an SEP against the total monetary penalty payable under EPA's enforcement policy for the alleged violations. EPA has established procedures for determining both the cost of the SEP and the percentage of that cost which the proponent may claim as a credit against the amount of the penalty.

EPA determines the net present after-tax cost of an SEP with its computer model PROJECT, which considers (i) capital costs, (ii) one-time nondepreciable costs, and (iii) annual operational costs and savings. PROJECT considers only the years in which the respondent is legally bound to perform the SEP and does not include any replacement cycles outside of that time period.

EPA has discretion to determine what percentage of the estimated cost – the mitigation factor – may be offset as a credit against the total penalty amount based on several criteria it uses to rate the proposed SEP. Criteria for determining the mitigation factor include benefit to the public, environmental justice, multimedia impacts, and pollution prevention. After determining the appropriate mitigation factor, EPA also may subtract the cost of any significant government resources that are used for monitoring.

The mitigation percentage cannot exceed 80% of the SEP cost, unless the proponent is a small business, government agency or nonprofit organization, or the project is an exceptional pollution prevention activity. In addition, the total credit given for an SEP cannot result in payment of a monetary penalty that is less than EPA's minimum criteria: the economic benefit of noncompliance plus 10% of the gravity component *or* 25% of the gravity component, whichever is greater.

EPA calculates the economic benefit of noncompliance with BEN, an after-tax, cash-flow model, which penalizes respondents for both the initial period of noncompliance and the assumed delay in replacing equipment in the future. The gravity component includes adjustments for factors in the penalty policy, such as audits and good faith.

Failure to Perform an SEP. Stipulated penalties for failing to satisfactorily perform an SEP range between 75% and 150% of the mitigation value originally awarded to the project. A proponent may avoid the penalty if good faith and timely efforts were made to complete the work *and* at least 90% of the funds budgeted for the SEP actually were spent. Overvaluing the cost of an SEP will also be penalized. Even if an SEP is successfully completed, a respondent must pay stipulated damages, between 10% and 25% of the original mitigation awarded, if the final cost of the SEP is less than 90% of the projected value.

State SEP Programs

Most states now have policies permitting the use of SEPs in enforcement settlements. These states generally look to EPA's SEP policy as a model, including its use of PROJECT to calculate SEP costs. The extent to which states will allow proponents to offset the cost of an SEP against the total penalty due varies. As indicated in the table below, states may cap the potential mitigation percentage below the federal level of 80% and may demand more SEP dollars to offset a single penalty dollar.

Jurisdiction	Maximum Mitigation
EPA	80%
Massachusetts	100%
New York	Unspecified
California	25%
Texas	50%

SEP policies vary widely across the country, and their application is further tempered by the prosecutorial discretion of each agency official and the constraints, including administrative budget pressures, under which that official must operate. A summary of formal policies adopted in four representative states, however, is provided below.

Massachusetts

The entire cost of an SEP in Massachusetts can be used to mitigate the monetary penalty as long as at least 25% of the penalty or the economic benefit gained from the violation, whichever is greater, is paid in cash. SEPs are allowed in Massachusetts only if a respondent can show that it has the financial ability to correct all noncompliance and has either already remediated any harm caused or is capable of doing so in the future. An SEP will not be allowed if its performance will impede a respondent's ability to comply or perform a remedial measure. While EPA gives priority to pollution prevention projects, Massachusetts places the highest value on resource conservation activities. The Massachusetts policy is available at *http://www.state.ma.us/dep/enf/enforce.htm#policies.*

New York

In 1995, New York issued a policy on Environmentally Beneficial Projects ("EBP"), the state's version of SEPs, available at *http://www.dec.state.ny.us/website/ogc/egm/ebp.html.* The state program does not establish a maximum mitigation percentage, but notes that some cash penalty must be included in the final settlement. The rest of New York's policy is similar to EPA's 1995 policy, but stricter in several ways. For instance, respondents in New York who commit a violation intentionally, knowingly or recklessly are not eligible for the EBP program. Similarly, respondents who failed to take all necessary steps to correct the violation, who caused a threat to the public health or grave environmental harm or who have a history of noncompliance will not be allowed to use EBPs to offset the monetary penalty. In addition, the state prohibits projects that a respondent would have undertaken anyway within the next *five* years, a period more than double that established by EPA.

California

The cost of an SEP in California can only mitigate 25% of the total penalty because the state wants to ensure that the final monetary penalty removes any unfair competitive advantage and economic benefits gained by the respondent's violation. The state's policy otherwise adopts EPA's program in virtually all respects, and is available at *http://www.calepa.ca.gov/Programs/enforce/ensec9.htm.*

Texas

Credit for an SEP is limited to 50% of the total penalty assessed by Texas. Projects that either reduce pollution emissions or directly clean up environmental contamination may receive a dollar-for-dollar penalty reduction; otherwise, the average ratio in 2000 was $1.20 in SEP dollars to mitigate $1 of penalty. The Texas program is more flexible than EPA's Policy in several ways. For instance, Texas does not have a nexus requirement, but instead gives preference, and thus a higher mitigation ratio, to projects that directly benefit the environment of the community where the violation occurred. Similarly, Texas will accept a broad range of projects as SEPs, such as activities that promote public awareness of environmental matters, the cleanup of illegal municipal and industrial solid waste dumps that are unrelated to the violation or the respondent, and cash contributions to

ongoing programs or projects. Finally, Texas does not use stipulated penalties for the failure to expend funds budgeted for an SEP, but instead orders the money to be forfeited to the state's general revenue. The Texas policy is available at *http://www.tnrcc.state.tx.us/legal/sep/seppolicy.htm.*

Before beginning a settlement negotiation with a state agency, a respondent should understand the state's SEP policy and ask the relevant state agency for suggestions for acceptable projects. A familiarity with EPA Policy will be helpful because it inevitably serves as the starting point for each state's program. Respondents should look for differences regarding categories of projects, nexus, pricing and penalty assessment methodologies, and limits on mitigation percentages.

SEP Strategy

Before proposing an SEP, respondents should: (i) consider the benefits and costs of potential SEPs, (ii) decide what time commitment is practicable, (iii) calculate the costs of different projects using the appropriate economic model, and (iv) determine how to maximize mitigation credits. Throughout the process of developing an SEP, respondents will benefit from identifying and targeting the agency's preferred SEP categories and objectives.

Benefits and Restrictions of SEPs

There are many possible benefits of performing SEPs, including reduced monetary fines, efficiency gains, avoidance of future violations and positive publicity. Economic benefits within the scope of the PROJECT model, however, will be recognized and will reduce the overall penalty mitigation value. Committing to perform an SEP means that a company accepts (i) potentially long-term, non-transferable responsibility and liability for the project; (ii) public access to documentation about the SEP; (iii) continual acknowledgement on any publicity regarding the SEP that the project is part of an enforcement settlement; and (iv) the risk of stipulated penalties if an SEP is not completed in accordance with the settlement agreement.

Such limitations do not necessarily eliminate the value of an SEP to a respondent interested, for example, in building better relations with regulators and the affected community. However, a full cost-benefit analysis, taking into account the risks, burdens, and duration of the legal and economic commitment, is necessary.

Length of SEPs

In choosing the length of an SEP, respondents must balance factors such as long-term commitment of resources versus immediate cash-flow requirements. Short-term SEPs are desirable if a respondent wishes to limit the length of its commitments but, under the PROJECT model, may result in reducing the net-present-value attributed to such projects. Projects from the following Policy categories tend to entail short-term commitments:

- Public health projects (unless continual treatment is involved)
- Assessments and audits
- Environmental compliance promotion
- Emergency planning and preparedness

If a respondent cannot pay the entire cost of an SEP immediately, then projects from the following categories may be preferable as they are often long-term:

- Pollution prevention
- Pollution reduction
- Environmental restoration and protection projects

Project lengths of more than 10 years cannot be incorporated into PROJECT, and EPA prefers activities that will be completed in under five years.

Cost of SEPs

Respondents must provide clear financial data, as any cost or benefit that is speculative will not be entered into PROJECT and thus will not be considered when evaluating the SEP's value. Because a minimum cash penalty is required, regardless of the value of an SEP, respondents should try to limit the cost of proposed projects to the amount that can receive mitigation credit. Accuracy in cost projections is crucial because over-estimating may result in stipulated penalties.

Maximizing Mitigation Credits

Respondents can increase the mitigation credit awarded an SEP by identifying significant public benefits provided and by choosing projects that are preferred by the pertinent agency or local

community. Projects that perform well on the following factors may achieve greater mitigation of monetary penalties:

- Pollution prevention
- Environmental justice
- Protecting or restoring ecosystems
- Innovativeness
- Community input
- Multimedia impact
- Minimizing government monitoring costs

Settlement discussions with regulators will progress more smoothly if respondents can clearly present the length, cost and public benefits of the proposed projects. Knowledge, initiative and careful economic analysis are crucial to obtaining the full benefit of any proposed SEP.

For additional information on Supplemental Environmental Projects, please contact:

Gregory Bibler gbibler@goodwinprocter.com 617.570.1621

Ex. 5 Attorney Work Product (AWP)/AC/DP

.....

(Original Signature of Member)

115TH CONGRESS
1ST SESSION

H. R. _____

To limit donations made pursuant to settlement agreements to which the United States is a party, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. GOODLATTE (for himself, Mr. PETERSON, and [see ATTACHED LIST of cosponsors]) introduced the following bill; which was referred to the Committee on _____

A BILL

To limit donations made pursuant to settlement agreements to which the United States is a party, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Stop Settlement Slush Funds Act of 2017".

SEC. 2. LIMITATION ON DONATIONS MADE PURSUANT TO SETTLEMENT AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY.

(a) LIMITATION ON REQUIRED DONATIONS.—An official or agent of the Government may not enter into or enforce any settlement agreement on behalf of the United States, directing or providing for a payment to any person or entity other than the United States, other than a payment that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment, or constitutes payment for services rendered in connection with the case or a payment pursuant to section 3663 of title 18, United States Code.

(b) PENALTY.—Any official or agent of the Government who violates subsection (a), shall be subject to the same penalties that would apply in the case of a violation of section 3302 of title 31, United States Code.

(c) EFFECTIVE DATE.—Subsections (a) and (b) apply only in the case of a settlement agreement concluded on or after the date of enactment of this Act.

(d) DEFINITION.—The term ''settlement agreement'' means a settlement agreement resolving a civil action or potential civil action, a plea agreement, a deferred prosecution agreement, or a non-prosecution agreement.

(e) REPORTS ON SETTLEMENT AGREEMENTS.—

(1) IN GENERAL.—Beginning at the end of the first fiscal year that begins after the date of the enactment of this Act, and annually thereafter, the head of each Federal agency shall submit electronically to the Congressional Budget Office a report on each settlement agreement entered into by that agency during that fiscal year that directs or provides for a payment to a person or entity other than the United States that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment, or constitutes payment for services rendered in connection with the case, including the parties to each settlement agreement, the source of the settlement funds, and where and how such funds were and will be distributed.

(2) PROHIBITION ON ADDITIONAL FUNDING.—No additional funds are authorized to be appropriated to carry out this subsection.

(3) SUNSET.—This subsection shall cease to be effective on the date that is 7 years after the date of the enactment of this Act.

(f) ANNUAL AUDIT REQUIREMENT.—

(1) IN GENERAL.—Beginning at the end of the first fiscal year that begins after the date of the en-

actment of this Act, and annually thereafter, the Inspector General of each Federal agency shall submit a report to the Committees on the Judiciary, on the Budget and on Appropriations of the House of Representatives and the Senate, on any settlement agreement entered into in violation of this section by that agency.

(2) PROHIBITION ON ADDITIONAL FUNDING.—No additional funds are authorized to be appropriated to carry out this subsection.

To: Schwab, Justin[schwab.justin@epa.gov]
Cc: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
From: Cozad, David[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=4A30A28BE6A74D3DA779BB7F7B34A876-COZAD, DAVID]
Sent: Thur 1/26/2017 12:58:03 AM (UTC)
Subject: SEPs - Advance material
2015 SEP Update.pdf

Hi Justin,

Thought it might be helpful to you to have some advance material on SEPs before our 2:00 tomorrow. Attached is a ppt that walks through the basics, in a less dense way than the policy itself.

Looking forward to our discussion.

Dave Cozad

2015 Update to the SEP Policy